Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

In re Joseph A. Rodriguez, M.D.
PETITIONER

ON PETITION FOR AN EXTRAORDINARY WRIT OF MANDAMUS TO REVERSE JUDGMENT TO

The United States Court of Appeals for the 11th Circuit

PETITION FOR EXTRAORDINARY WRIT OF MANDAMUS TO REVERSE JUDGMENT

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QUESTION(S) PRESENTED

1. Is it proper for Trial Court to grant Summary Judgment with Discovery outstanding?
2. Does spoliation of Dispositive material evidence, in a Federal lawsuit, warrant judicial sanctions?
3. Does spoliation of evidence in a Judicial Process warrant relief from Summary Judgment?
4. Does the suicide-death of the high-ranking, highly-trusted Director of Operations of the Respondent (five days following an incriminating police investigation for Fraud) warrant pertinent Interrogatories, a reopening of Discovery, and--indeed--a new trial?
5. Does an apparent Conflict of Interest of Respondent's Counsel (who is Petitioner's FORMER Counsel) warrant full disclosure, to the Court, prior to trial? Does this Conflict of Interest merit disqualification of Respondent's Counsel and reversal of Summary Judgment based on FL Bar 4-1.7 & 4-1.9, Case Law, and the Court's Per Se Rule?

LIST OF PARTIES

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject is as follows: Holy Cross Hospital, Inc. & United States of America

Explanation: This matter was initially filed as a Qui Tam Action based on the Federal False Claims Act, i.e. 31 U.S. Code §3730, in which the United States of America and Petitioner were Plaintiff and Plaintiff/Relator, respectively, i.e. co-plaintiffs. The Qui Tam Action was settled among the United States of America, Petitioner, and Defendant for false claims against the United States of America pertaining to 31 U.S. Code §3730 a-g. Claims pertaining to violation of 31 U.S. Code §3730 (h), aka Whistleblower Protection Provision of the Federal False Claims Act, were not settled in the Qui Tam Action nor were claims termed Contractual or Florida State Claims which had been consolidated under the initial Qui Tam Action which was then renumbered and relabeled by the Southern District Court in Miami as if a new Civil Action.

CERTIFICATE OF INTERESTED PERSONS

AND CORPORATE DISCLOSURE STATEMENT

- BROAD AND CASSEL, LAW FIRM FOR DEFENDANT/APPELLEE
- THE HONORABLE BARRY L. GARBER, UNITED STATES MAGISTRATE JUDGE
- THE HONORABLE DONALD L. GRAHAM, UNITED STATES DISTRICT JUDGE
- DAVID A. FREEDMAN, COUNSEL FOR DEFENDANT/APPELLEE
- HOLY CROSS HOSPITAL, INC. d/b/a HOLY CROSS MEDICAL GROUP AND HOLY CROSS HOSPITAL, DEFENDANT/APPELLEE
- LAW FIRM OF GARY E. SHERMAN, P.A.
- JOSEPH A. RODRIGUEZ, M.D., PLAINTIFF/APPELLANT
- GARY E. SHERMAN, COUNSEL FOR PLAINTIFF/APPELLANT
- STEVEN M. PARRISH, COUNSEL FOR DEFENDANT/APPELLEE
- ANDREW RAFKIN, COUNSEL FOR DEFENDANT/APPELLEE

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR EXTRAORDINARY WRIT OF MANDAMUS TO REVERSE JUDGMENT

Petitioner respectfully prays that an Extraordinary Writ of Mandamus issue to reverse judgment below.

OPINIONS BELOW

For cases from federal courts:

The opinion of the United States court of appeals appears at

Appendix A to the petition and is unpublished.

The opinion of the United States district court appears at

Appendix B to the petition and is unpublished.

JURISDICTION

For cases from federal courts:

The date on which theUnited States Court of Appeals decided my case was:

October 22, 2004

A timely petition for rehearing was denied by the United States Court of Appeals on the following date:

December 6, 2004

and a copy of the order denying rehearing appears at Appendix C .

The jurisdiction of this Court is invoked under 28 U.S.C.§1651 (a)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Florida Constitution, Article I § 22

(See also "Statutes and Rules" and "Others")

STATEMENT OF THE CASE

Synopsis

The 11th Circuit departed from the essential requirements of law by affirming summary judgment entered by the U.S. District Court for the Southern District of Florida, in spite of:

1. The existence of material issues of fact and spoliation of evidence

2. The failure of Respondent hospital to provide court-ordered production of billing documents that would have proven Petitioner's Qui Tam/ Whistleblower Protection case

3. The suicide of a hospital Officer found to have been involved in fraudulent billing at the hospital--a hospital from which Petitioner was discharged following his reporting of fraudulent Medicare billing

4. Significant Conflict of Interest of Respondent's Counsel (who is Petitioner's FORMER Counsel)--to which Petitioner never willfully consented

Respondent is a Catholic-sponsored hospital with powerful political connections in Miami.

Contrary to the essential requirements of law, the trial court and the 11th Circuit failed to view the facts in a light most favorable to Petitioner--opting to ignore the spoliation and fraud issues that were properly part of the court record.

There was sufficient evidence for the jury to find for Petitioner.

The 11th Circuit and the U.S. District Court should have reviewed "all of the evidence in the record" Reeves v. Sanderson Plumbing Products, Inc., 120 S. Ct. 2097 (2000). In Reeves this Court found the Court of Appeals misapplied the standard of review dictated by Rule 50, disregarding critical evidence favorable to petitioner--namely, evidence supporting Petitioner's case, as here.

The 11th Circuit misinterpreted Florida's law to allow summary judgment when there exist on the record justiciable issues of material fact, the 11th Court is in error, and this Court should vacate the summary judgment affirmance and remand with instructions. Thomas v. American Home Products, Inc., 117 S. Ct. 282 (1996).

The decision of the 11th Circuit to affirm summary judgment when there exist issues of material fact has so far departed from the accepted and usual course of judicial proceedings...as to call for an exercise of this Court's supervisory power. See "Why This Case is Important to the United States of America", for argument.

Petitioner has no recourse but by Petition for Extraordinary Writ of Mandamus to Reverse Summary Judgment to this Court.

Elaboration

"Federal Rules of Civil Procedure (FRCP), Rule 50--Judgment as a Matter of Law in Jury Trials.
(a) Judgment as a Matter of Law

(1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient

> evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue."

Summary Judgment must show that movant wins--regardless of evidence that might be presented to a jury--as a matter of law, because there are no remaining issues of material fact for the jury to decide. There is no need for a jury. No need for a trial. No need to demonstrate a preponderance of evidence. There are no remaining issues. This is what summary judgment requires.

The three essential points...
Nearly always, summary judgment is reversed because:

(1) there are remaining issues of material fact that should be resolved by a jury at trial
(2) there is outstanding discovery that would potentially affect the outcome of the case, or
(3) the trial judge "tried" factual issues instead of leaving them for the jury to decide.

All three of these conditions hold true, in the affirmative, in the matter of Joseph A. Rodriguez, M.D. vs. Holy Cross Hospital, Inc.

Some of the Remaining Issues of Material Fact
See Joint Pretrial Stipulations
According to Respondent's Counsel, Dispositive material evidence had been "discarded" in 1999. The material evidence was dispositive because it is needed to corroborate multiple, deposed testimonies favorably attesting to

Petitioner's productivity (Respondent's counter-argument to Petitioner's Prima Facie argument alleges low laboral productivity) and to uphold Petitioner's claim of productivity incentive bonus underpayment by Respondent (one of several State and Employment Contract claims consolidated in this Federal Civil Action). See "Details" below.

In DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION TO STRIKE EXPERT WITNESS TESTIMONY OF ADAIR, FULLER, WITCHER ET TAL (Accounting Expert for Respondent), Respondent states the following on pp. 5 and 6:

> "...the "greenbar" computer printouts were thrown away by Adair Fuller in first half of 2001. (Exhibit E, paragraph 9). Thus, 1,011 page "greenbar" computer printout for office visits at Holy Cross' Pompano Beach and Galt Clinics from April 1, 1995 though August 19, 1996 as well as a 136 page "greenbar" computer printout for hospital and ancillary visits related the Pompano Beach and Galt Clinics no longer exist. Holy Cross does not have the ability to reproduce these documents.
>
> In addition, the superbills which Adair Fuller examined in its review also no longer exist. Adair Fuller did not make copies of the thousands of superbills reviewed, and Holy Cross did not have retention procedures in place for the superbills which at the time were treated as internal office billing documents mirroring computer billing records. The superbills were discarded prior to the filing of Rodriguez' Qui Tam complaint in November 1999."

Second Affidavit of Adair Fuller, dated 3/5/03:

"9. After Adair Fuller issued its January 22, 1997 report, it heard nothing further on this matter until September 2002. By that time, the greenbar printouts could not be located, and it is believed that my office threw those documents were thrown away in the first half of 2001.

10. During its review of this matter, Adair Fuller generally did not make copies of the superbills reviewed in this matter. It simply noted exceptions between the greenbar billing records and superbills in the document which is attached as Exhibit "1" to the January 22, 1997 report. The only superbills copied were 14 superbills which were originally believed to be missing, but were later at the end of the review. These 14 superbills were retained in Adair Fullers file. "

Public Policy Duty of Respondent and Respondent's Agent, Adair Fuller

HHS; CMS (Centers for Medicare & Medicaid Services); Program Memorandum Intermediaries; p. 2, Policy for Provider Records Retention of Medicare Secondary Payor (MSP) Information:

"42CFR 489.20(f) states that the provider agrees to maintain a system that, during the admission process, identifies any primary payers other than Medicare, so that incorrect billing and Medicare overpayments can be prevented. Based on this regulation, hospitals must document and maintain MSP information for Medicare beneficiaries. Without this documentation, the

intermediary would have nothing to audit submitted claims against.

Furthermore, since Centers for Medicare & Medicaid Services (CMS) may pursue providers, physicians, and other suppliers under the False Claims Act and the Federal Claims Collection Act for up to ten (10) years after a claim is paid, it would be prudent for hospitals to retain these records for up to ten (10) years. Should a hospital choose not to retain this information for up to ten (10) years, it does so at its own risk."

"CMS RULES
05-01 BILLING PROCEDURES 556
Retention and Destruction of Health Insurance Records

556. RETENTION OF HEALTH INSURANCE RECORDS
Maintain the several categories of health insurance materials related to services rendered under title XVIII for the prescribed retention periods outlined below unless State law stipulates a longer period. They should be made available for reference to HCFA, intermediary, DHHS audit or other specially designated components for bill review, audit, and other references during the retention period.

556.1 Categories of Health Insurance Record to Retain.--If these records are microfilmed, see §556.3.
A. Billing Material.--SNF copies of Forms HCFA-1450 and any other billing forms, supporting documents and forms, charge slips, daily patient census records, and other business and accounting records which refer to specific claims.

556.2 Retention Period.--Retain all materials referred to above for a period of 5 years after the month the cost report to which they apply is filed with the intermediary."

Lodging approval of Program Memorandum Intermediaries by Clerk is pending.

"FRCP, Rule 37. Failure to Make or Cooperate in Discovery; Sanctions

(a) Motion for Order Compelling Disclosure or Discovery.

Motion.

(A) If a party fails to make a disclosure required by Rule 26

(a), any other party may move to compel disclosure and for appropriate sanctions. . .

(3) Evasive or Incomplete Disclosure, Answer, or Response.

For purposes of this subdivision an evasive or incomplete disclosure, answer, or response

is to be treated as a failure to disclose, answer, or respond.

Failure to Disclose; False or Misleading Disclosure; Refusal to Admit.

A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1), or to amend a prior response to discovery as required by

Rule 26(e)(2), is not, unless failure is harmless, permitted to use as evidence at trial, at a hearing, or on a motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions. In addition to requiring payment of reasonable expenses, including attorney's fees, caused by the failure, these sanctions may include any of the actions authorized under Rule 37(b)(2)(A), (B), and (C), i.e.:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party; and may include informing the jury of the failure to make the disclosure."

Employment Contract Duty of Respondent

Page 4, D, Records:

"Hospital shall maintain and preserve such records, either in their original form, microfilm or other copy for at least as long as required by law. Consistent with applicable law, Doctor shall have access to such records as necessary to defend claims made against him for professional negligence or the like in connection with the provision of services pursuant to this Agreement."

APPROPRIATE DATES TO DISCARD RECORDS

Based upon employment termination date in mid-August 1996...

--CMS (5 years) Earliest date to shred: August 2001

--IRS "Tax Guide for Churches & Religious Organizations", p. 17 (4 years)
Earliest date to shred: August 2000

--Federal False Claims Act (10 years)-------Earliest date to shred:
--Federal Claims Collection Act (10 years)--Aug. 2006
--Florida State Law on medical record retention (adult) (4 years): Earliest date to shred: August 2000
--Case Law on evidence retention in probable future litigation Earliest date to shred: Settlement of matter, exhaustion of final appeal, or statute limitation

Respondent and Adair Fuller had a duty to comply with Public Policy. Both had a Contractual Obligation to Petitioner to retain billing records. Spoliation of evidence by Respondent and by Adair Fuller--whether negligent or intentional--constitutes flagrant violation of Public Policy and a grave breach of the Employment Contract between Respondent and Petitioner. These unconscionable actions have inflicted enormous damages against Petitioner in the afore-referenced matter by depriving Petitioner of:

1. The opportunity to recover his meritorious damages from Respondant before a jury of peers.

2. The Basic Right to a jury trial pursuant to the Florida Constitution; Article I; § 22, Trial by jury:
   "The right of trial by jury shall be secure to all and remain inviolate..."

Petitioner had, as Pro Se, communicated to the Appellate Court, in Motion for Reconsideration of Affirmation of Summary Judgment, that the Respondent (or its agents) had purposely destroyed material evidence and evaded the magistrate's order to produce. Likewise, Petitioner's Counsel had done so at the District level by way of Motion to Compel Production, Motion for Sanctions..., Motion to Strike Adair Fuller..., and Hearing to Discuss Sanctions.

Petitioner's Counsel had communicated to the Appellate Court the same information in Reply Brief and Answer Brief of Plaintiff/Appellant which were Striken by the Court. Thus, there could not have been summary judgment in the first place...at least not summary judgment that should have survived appeal to the 11th Circuit.

Outstanding Discovery

In his Summary Judgment Ruling, District Court Judge, Donald Graham concludes:

> " ORDERED AND ADJUDGED that this case is closed for administrative purposes and all pending motions are DENIED as moot."

The "moot" motions referred to by Judge Graham include those listed in the Joint Pretrial Stipulation, on pp. 3 & 4, under "List of undisposed motions requiring action by the court" and include the following Motions of Petitioner:

1. Plaintiff's Motion to Strike Expert Witness Adair Fuller.
2. Plaintiff's Motion for Sanctions Against Defendant for Spoliation and Failure to Produce Evidence.
3. Defendant's Motion in Limine (to be filed in accordance with Pretrial Deadlines)
4. Plaintiff's Motion for Attorney Fees (to be filed as instructed by the Court at the March 19, 2003 pretrial conference).

See also Striken Reply Brief and Answer Brief of Plaintiff/Appellant authored by Petitioner's Counsel and presented for admission during appeal.

Maxim

The judge who decides a case without hearing both parties, though his decision be just, is himself unjust.

Where discovery is outstanding (as in this case where the hospital and its agents spoliated and failed to produce evidence vital to Petitioner's damages and where we now discover that a high-ranking, highly-trusted Director of Operations of the Respondent, Linda Perkins aka Linda Marie Cook, committed suicide, following Fraud investigation by local police) summary judgment is improper and should be reversed or remanded on appeal. See Fort Lauderdale and Broward Sheriffs Office-Cooper City Police Reports of Fraud and Suicide Investigations as well as "Organizational Tree of Holy Cross Hospital". Florida State Attorney's Office is now investigating inordinately high number of Broward County criminal cases which were "Exceptionally Cleared" by local police. Decedent's investigation which was "exceptionally cleared" may be reopened. See *"After 5 years, 'reform' got reformed (the way Broward Sheriffs Office clears crimes that can't be prosecuted is at the center of the state attorney's investigation of some deputies' illicit actions)", The Miami Herald, 3/13/05. Lodging approval by Clerk is pending. The "Organizational Tree..." is Petitioner's illustrative rendition of Decedent's position in Respondent's hierarchy based on Petitioner's recollection and on Office Manager, Susan Anastay's, deposition, p. 13 at 23:

A. "...And I walked into this every day as well as Dr. Rodriguez and I reported this to my manager, Linda Perkins."
Q. "Is she the manager at Holy Cross?"
A. "She was my manager."
Q. "I see."
A. "My office Oceanside was underneath her."
Q. "I see."

A. "Which she asked me to provide a list and documentation and bring it to her attention along with Dan Comrie."

This begs rhetorical questions...
Could spoliation of and failure to produce evidence be inferred as additional badges of fraud of the late Director of Operations? If so, might such badges of fraud constitute violations of 18 U.S.C.; §§ 1001, 1503, 1505, 1506, 1515--and perhaps 1512 & 1519--should one reject Respondent's professed document destruction dates "prior to...November 1999" and "by the first half of 2001"?

In U.S. v. Lundwall, former Texaco executives were charged under 18 U.S.C. 1503 by the Court in a Civil Action after it was found that the Defendants had spoliated dispositive evidence in a Retaliatory Discharge matter similar to this one.

§§1503, 1505, & 1506 generally require prior knowledge of an impending Federal Proceeding and Respondent has alleged ignorance concerning impending Federal Proceedings. Yet the Fifth Circuit has noted:

> "Pet.App. 28a-29a, it is a 'venerable principle that ignorance of the law generally is no defense to a criminal charge' ", Arthur Andersen L.L.P. v. U.S., Brief for the U.S. in Opposition.

Respondent's professed naivete and ignorance may not be genuine, however, as Respondent hospital is a Government Contractor specializing in U. S. Government healthcare contracts. Assuming that Respondent is advised by competent Healthcare Counsel, Respondent was undoubtedly aware of the probability of periodic

Government audits of billing claims submitted by Respondent for payment. Thus, by having signed Government Healthcare Contracts, a Federal Proceeding was at all times probable and "pending" for Respondent--who was obligated to retain pertinent documents for Government or Intermediary Auditor review as spelled out on pp. 8 and 9 of this Petition. U.S. v. Leo, 941 F.2d 187, 199 (3rd Cir. 1991), (standard post-award audit of defense contractor by Defense Contract Audit Agency was a Section 1505 "proceeding"); U.S. v. Fruchtman, 421 F.2d at 1021 (investigation conducted by single FTC attorney who made request to see defendant's invoices was a section 1505 "proceeding").

In Arthur Anderson, L.L.P. v. U.S.--a case, on the 1/7/05 docket, for which the Supreme Court has granted Writ of Certiorari--the famed accounting firm, Arthur Anderson, was charged with 18 U.S.C.; § 1512 for directing the destruction of documents. § 1512 concerns the "Tampering with a witness, victim, or an informant". 31 U.S.C. 3730 Whistleblowers, such as the Petitioner in this matter, are Relators or "informants" at the service of the United States of America. In Petitioner's case, the Informant (Petitioner) became Victim when he was deprived of dispositive evidence by the Respondent which led to a Summary Judgment which, in turn, resulted in Petitioner being deprived of a trial by jury to recover his meritorious claims from Respondent.

One has inferred that Respondent's Decedent Director of Operations may have been involved in the malevolence of spoliation of evidence but were other sinister parties involved, as well? Do these ominous considerations not warrant reopening of Discovery, pertinent Interrogatories--indeed--A New Trial?

FRCP,Rule 60-- Relief From Judgment or Order

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);

(3)fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

FRCP Rule 60, Standard of Review

1. Evidence must be newly discovered since trial or judgment.
2. Due deligence on part of movant must be shown.
3. The evidence must not be merely cumulative or impeaching.
4. The evidence must be material.
5. The evidence must be such that a new trial would probably produce a new result.

Application of Standard:

1. Respondent's Director of Operations took her life on 4/7/04--nearly one year following the date of Summary Judgment. Newspaper publication of the tragedy took place on 5/13/04 (Date of Discovery). Neglect was Excusable, investigation was ongoing and Police Report was not immediately available to Petitioner.
2. Retrieving and introducing the Police Reports shows Due Deligence.
3. Evidence is New.

4. Evidence is very material, as it is likely that Decedent, as Director of Operations, was entrusted to handle the now spoliated evidence. See, 8/7/96, memo of Sandy DiSalvo to Mark Dissette; Plaintiff'sExhibit 3; Bates 000052. Left lower margin of page bears: "cc: Linda Perkins". Also see deposition of Office Manager, Susan Anastay, p. 13 at 23; and "Organizational Tree of Holy Cross Hospital" (lodging approval by Clerk is pending).
5. Admission of Decedent's Police Reports and appropriate sanctions against Respondent for Spoliation and Failure to Produce Evidence would undoubtedly produce a different outcome at trial.

Trial Judge as "Trier of Fact"

Appeals are controlled precisely by rules. Appeal is always a process by which the aggrieved litigant calls upon the higher court to review whether the lower court ruling was proper as a matter of law. Appeal is a process where if that lower court ruling is summary judgment (as opposed to a decision at the close of a full evidentiary trial), the effective challenges are the three listed above on page 6...not a rehash of the facts nor arguments as to whether the trial judge did or did not understand the facts. Appeal has to demonstrate conclusively, from the record itself, that the lower court was precluded (by one of the three key points stated above) from entering Summary Judgment in the first place.

Summary judgment is not a trial on the merits. The very mention of burden of proof (i.e., preponderance of evidence) has no place in summary judgment proceedings. Summary judgment is not a mini-trial of disputed issues. Summary judgment is a determination as to whether there are any disputed issues at all. If there are, the case goes to a jury. That is our right under Florida's Constitution, Basic Rights,

Article I, § 22. If there are no disputed issues, then and only then, summary judgment is proper as an economy of the State's limited judicial resources. The courts are not intended to try factual issues on summary judgment motions. If factual issues exist that are "material" to the outcome, the case should go to a jury. That is the law.

Furthermore, summary judgment was entered based on the court's view there was no "causal link" between Petitioner's Protected Activity and the discharge ...an issue of fact that should be for a jury to decide, not a Federal District Judge on a motion for summary judgment. It was altogether improper.

For the district court to "determine that retaliation was not a factor in Defendant's actions because it was not satisfied that Plaintiff adequately rebutted Defendants' argument that it maintained a good working personal relationship with him" is completely outside the scope of summary judgment. The trial judge was trying issues of material fact in dispute--precisely what is forbidden in summary judgment proceedings.

It is absolutely improper on summary judgment for a judge to discredit testimony of a witness, e.g., Comrie, on the grounds Petitioner and Comrie were "duck hunting buddies" or on any other ground. Wrong forum for this. It is an issue for the jury to consider--not him.

The Florida Supreme Court consistently holds that motions for summary judgment should be granted only if the moving party is entitled to judgment as a matter of law. It was never intended that cases would be tried by affidavit or that affidavits, interrogatories, depositions, or similar evidence be used as substitutes for a jury trial. The moving

party has the burden to prove absence of any genuine issue of fact, and all doubt as to existence of such fact must be resolved against movant. If movant's showing is inadequate or issue of fact otherwise appears, the motion must be denied. To sum it all up, if there are issues of fact and the slightest doubt remains, summary judgment cannot be granted. Williams v. City of Lake City, 62 So.2d 732 (Fla.1953).

Summary judgment is improper where the facts are not so crystallized that nothing remains but questions of law. St.Fort v. Florida Department of Transportation, 688 So.2d 469 (Fla. 4th DCA 1997).

The party moving for summary judgment must show conclusively the absence of any genuine issues of material fact. If the evidence raises any issues of material fact, if it is conflicting, if it will permit different inferences, or if it tends to prove the issues, it should be submitted to the jury as a question of fact to be determined by the jury. The trial court must interpret every possible inference in favor of the non-movant. Fenster v. Publix Supermarkets, Inc., 785 So.2d 737 (Fla. 4th DCA 2001); Moore v. Morris, 475 So.2d 666, 668 (Fla.1985).

Summary judgment should not be granted until facts are sufficiently developed for the court to be reasonably certain no genuine issue of material fact exists. Epstein v. Guidance Corporation, Inc., 736 So.2d 137 (Fla. 4th DCA 1999); Lubarsky v. Sweden House Properties of Boca Raton, Inc., 673 So. 2d 975--(Fla App. 4 Dist. Judgm 186

Conflict of Interest

Petitioner moves Court to take Judicial Notice of the fact that Respondent's Counsel, Broad & Cassel, maintained significant Conflict of Interest over the course of this matter.

During the Qui Tam Action phase--during which the United States of America was party in this matter--Broad & Cassel represented Petitioner, Petitioner's Office Building Landlord, and Respondent, simultaneously. See: Exhibit 1, p. 16-19, i.e. signatures of Settlement Agreement Between the United States, the Relator, and Holy Cross Hospital, Inc.; 2/19/01, *Employment Agreement between Broad & Cassel and Joseph A. Rodriguez, M.D.; 8/15/2000, *letter from Weston Outpatient Surgical Center to Julie Gallagher, General Counsel of AHCA (declaring Broad & Cassel as having been retained by Richard Famiglietti, Office Building Landlord of Petitioner); 8/22/01, *letter from Michal Tingle, DOJ Trial Attorney, to Edward J. Hopkins, Esq. of Broad & Cassel; 8/19/01, *letter from Petitioner to his Counsel in which Petitioner states:

> "Mr. Sherman, I hereby request that you communicate to the Court--directly--my strong objection concerning the continued participation of Broad & Cassel attorneys in the aforereferenced case. In effect, I hereby request that the Court immediately remove from this case Holy Cross Hospital's unethical Broad & Cassel attorneys."

*Letter from U.S. DOJ Trial Attorney, Michal Tingle, to Edward J. Hopkins, Esq. of Broad & Cassel:

> "Dear Mr. Hopkins:
>
> It has come to my attention that your firm represents Joseph A. Rodriguez, M.D., the relator in the above-referenced qui tam action, in connection with another matter. Inasmuch as your firm also represents defendant Holy Cross Hospital, Inc. (HCH), it appears that your firm may have a conflict of interest. Attached

for your convenience is a copy of the engagement letter Dr. Rodriguez signed with Gabriel L. Imperato of Broad & Cassel on February 19, 2001. Please advise me as soon as possible whether and how you have addressed this issue, or, if you have not already addressed the issue, please advise me how you intend to do so going forward.
Very truly yours,..."

Lodging approvals for *'d documents from Clerk are pending.

U.S. District Court for the Southern District of Florida:

"...has adopted both the Florida Rules of Professional Conduct (Disciplinary Enforcement Rule 4B) and the American Bar Association Rules of Professional Conduct (Local Rule 16C). As to the provisions discussed herein, the two sets of rules are essentially identical." Florida Ins. Guar. Ass'n Inc. v. Carey Canada, 749 F.Supp. 255 (S.D.Fla. 1990)

Ethical Model Rule

DR 5-101 (A) Lawyer may not accept employment if the lawyer's professional judgment will be or reasonably may be affected by the lawyer's own interest, except with informed consent of the client.

FL Rule 4-1.7 (a)

Bars representation of a client whose interests are directly adverse to another client's interests unless:

1. Lawyer has reasonable belief in the ability to effectively represent both clients, and

2. Each client consents after consultation

Florida Bar v. Marke, 669 So. 2d 247 (Fla. 1996); Florida Bar v. Sofo, 673 So. 2d 1 (Fla. 1966); Florida Bar v. Joy, 679 So. 2d 1165 (Fla. 1996)

FL Rule 4-1.7 (b)

> Bars a lawyer from undertaking any representation if the lawyer's independent professional judgment will be compromised by duties to another client, to a third party, or to the lawyer's own interests--unless the lawyer obtains consent from the first client and has a reasonable belief in the ability to be an effective advocate.

FL Rule 4-1.7 (a) & (b) attempts to safeguard a lawyer's duty of loyalty to present and former clients and presumes that this vital loyalty would be eroded if lawyer were to have responsibilities to a second client with adverse interests relative to a first client. Rule Comments:

> "...loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent...even if [the adverse respresentations are] wholly unrelated". Florida Ins. Guar. Ass'n v. Carey Canada, Inc., 749 F. Supp. 255, 260 (S.D. Fla. 1990).

Furthermore, "clients who were concurrently represented at any point during the conflict are treated as concurrent clients for purposes of the disqualification motion." Fund of Funds, Ltd. v. Arthur Andersen & Co., 435 F. Supp. 84, 95 (S.D.N.Y.1977), aff'd in part, rev'd in part on other grounds, 567 F.2d 225 (2nd Circ. 1977). Yet, "the challenged attorney cannot be allowed to 'convert a present client into a "former

client" by choosing when to cease to represent the disfavored client'." Unified Sewerage Agency, 646 F.2d at 1345 n. 4.

FL Bar Rule 4-1.9 Provides:

A lawyer who has formerly represented a client in a matter shall not thereafter:

(a) Represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation; or

(b) Use information relating to the representation to the disadvantage of the former client except as rule 4-1.6 would permit with respect to a client or when the information has become generally known.

The Model Rules further provide that "[a] lawyer shall not reveal information relating to representation of client...unless the client consents after disclosure to the client". State Farm v. K.A.W., 575 So.2d 630, 632 (Fla.1991).

"Our legal system cannot function fairly or effectively if an attorney has an informational advantage in the form of confidences gained during a former representation of his client's current opponent. (Purpose of trial court is to afford parties an impartial forum; trial court may decide that disqualification is mandated because one party has an unfair advantage over the other)." State Farm Mut. Auto. Ins. Co. v. K.A.W., 575 So.2d 630 (Fla. 1991).

Under FL Bar Rule 4-1.9, in representation adverse to interest of former client, a lawyer must be disqualified, if:

1. Lawyer formerly represented opposing party in same or similar case.
2. Lawyer is in position to use confidential information against a former client.

Courts have consistently held that representation gives "rise to an irrefutable presumption that confidences were disclosed thereby preventing the lawyer from representing a client with interests materially adverse to those of the former client...", University of Miami v. Dansky, 622 So.2d 613 (Fla.App. 1 Dist. 1993) See also Junger Utility & Paving Co., Inc., v. Myers, 578 So. 2d 1117 (Fla.App. 1 Dist. 1989); Brent v. Smathers, 529 So. 2d 1267 (Fla. 3d DCA 1988); Terry v. State, 668 So. 2d 954 (Fla. 1996).

At present, Broad & Cassel is believed to represent Petitioner's Office Building Landlord and Respondent. As Affidavit of corroborating witness, Janeth Rojas, suggests, (lodging approval by Clerk is pending), unauthorized persons may gain unhindered access to Petitioner's vital case file containing work-papers and privileged Attorney-Client correspondence pertaining to this matter by means of Building Landlord's staff acting in Good Faith or by inadvertence. Can anyone provide Petitioner with irrefutable assurance that such unauthorized access to Petitioner's files has not taken place?

> "If two actions are substantially related, court will not require proof that attorney had access to confidential information, nor give weight to attorney's assertion that he had no access to and did not possess confidential information." Government of India v. Cook Indus., Inc.,

422 F.Supp. 1057, 1060 (S.D.N.Y.1976), aff'd, 569 F.2d 737 (2d Cir.1978).

"Among the partners of a law firm and regarding a long-time, substantial client, presumption that the client's confidences were shared among the partners cannot be rebutted..." In Re Corrugated Container Antitrust Litigation, 659 F.2d 1341 (1981).

"The advice does not need to be 'relevant' in the evidentiary sense to be 'substantially related.' It need only be akin to the present action in a way reasonable persons would understand as important to the issues involved." In Re Corrugated Container Antitrust Litigation, 659 F.2d 1341 (1981).

"Furthermore, since the Ethics Code's protection of a client's confidences is broader than the evidentiary attorney-client privilege protecting privileged communications, disqualification is indicated here to avoid the appearance of impropriety.", Buntrock v. Bruntrock, 419 So.2d 402 (Fla. 4th DCA 1982).

"...even an appearance of impropriety may, under the appropriate circumstances, require prompt remedial action from the court...Consequently, any doubt is to be resolved in favor of disqualification," Contant v. Kawasaki Motors Corp., 826 F. Supp. 427 (M.D. Fla. 1993). Receiving other side's work product and not advising other side leads to attorney disqualification. Rico v. Mitsubishi Motors Corp., 10 Cal. Rptr. 3d 601 (Cal. App. 2004).

Consistent with U.S. Dist. Ct. Rules M.D.Fla., Rule 2.04(c), the Eleventh Circuit uses a two-pronged test in attorney disqualification cases based on conflict of interests:

1. An attorney-client relationship exists or existed in the past
2. The moving party does not need to show specific confidences that have been revealed by the former client. The moving party must show that the present and prior representations are substantially related. To accomplish this, the movant must demonstrate "the relationship between the subject matters, issues and causes of action of both the present and previous representations so that the court can determine whether a substantial relationship exists", Contant v. Kawasaki Motors Corp., 427 (M.D.Fla. 1993).

The continued Conflict of Interest of Respondent's Counsel has potentially undermined "public confidence in the legal profession and the judicial process", In re Yarn Processing Patent Validity Litigation, 530 F.2d at 89. See also Kenn Air v. Gainesville-Alachua Airport Auth., 593 So.2d 1219 (Fla.App. 1 Dist. 1992). "Should the public no longer feel the ability to confide in the members of the bar, our judicial system would not be able to function as we know it today." Contant v. Kawasaki Motors Corp. U.S.A., Inc., 826 F.Supp. 427 (M.D.Fla. 1993). "Opposing counsel may seek disqualification where the conflict of interest clearly calls into question 'the fair or efficient administration of justice'." Zarco Supply Co. v. Bonnell, 658 So.2d 151 (Fla.App. 1 Dist. 1995)

"If the trial court fails to restrain the attorney in such a case [where unlawful conflict of interest is revealed] and the failure is prejudicial, a judgment obtained in favor of the

subsequent client may be reversed on appeal.", U.S. v. Bishop, 90 F.2d 65 (6th Cir.1937). Respondent Counsel's unethical conduct may merit reversal of Summary Judgment, pursuant to FRCP 60 (b) (6) ,based upon FL Bar 4-1.7 & 4-1.9, the Supreme Court's Per Se Rule and pertinent Case Law. Contant v. Kawasaki Motors Corp. U.S.A., Inc., 826 F.Supp. 427 (M.D.Fla. 1993). "The conflicting representation here requires reversal for a new trial, even had there been no apparent use of client confidences.", Junger Utility & Paving Co., Inc. v. Myers, 578 So.2d 1117 (Fla.App. 1 Dist. 1989); See also Ames v. Miller, 184 F. Supp. 2d 566 (N.D. Tex. 2002).

Why This Case is Important to the United States of America

The Federal Government is entrusted by the People of the United States of America to manage officially designated tax revenues, effectively, in order to provide the most goods and services to the most people possible. To accomplish this, the Government must operate frugally without waste and without Fraud. Not blessed with infinite manpower and resources, the Government relies on patriotic American taxpayers, Whistleblower Relators, to serve as the "eyes and ears" of Government and of the Public Interest beyond the ordinary reach of Government.

It is in the best interest of the United States of America--The People and their Government--to defend the actions of Whistleblower citizens throughout America. Whistleblower Protection Provisions in our laws are vital in this regard. They must be upheld. In Joseph A. Rodriguez, M.D. vs. Holy Cross Hospital, Inc.--they were not:

(1) The lower courts made serious errors of law and

(2) Summary Judgment was against the weight of the evidence. "Harmless errors" that are unlikely to have made a substantial impact on the result are not a basis for reversing the judgment of a lower court. The magnitude of the error in this case is far from "harmless" and is indeed extraordinary...

"28 U.S.C. § 1651 (a)
The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

The principal grounds for Petition for Extraordinary Writ in this matter:

"Supreme Court Rule 20; Procedure on a Petition for an Extraordinary Writ; Requirements:

1. Writ will be in aid of the Court's appellate jurisdiction.
2. Exceptional circumstances warrant the exercise of the Court's discretionary powers.
3. Adequate relief cannot be obtained in any other form or from any other court."

Application of Rule 20:

1. Affirmative
2. A. District and Appellate courts overlooked outstanding discovery and spoliation of evidence in this case.
   B. Director of Operations of Respondent committed suicide on 4/7/04 following police investigation for Fraud. It is believed that Decedent was entrusted to handle now spoliated evidence. Florida Department of Law Enforcement is now investigating inordinately high number of Broward County criminal cases which were

"Exceptionally Cleared" by local police. Decedent's investigation may be reopened.

C. Conflict of Interest of Respondent's Counsel who is Petitioner's FORMER counsel.

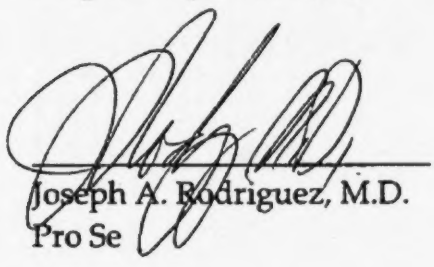
3. Relief was sought from District and Appellate courts. District Court affirmed its Summary Judgment while failing to rule on Motion for Sanctions for Spoliation of Evidence and Failure to Produce Evidence. When presented with Motion for Reconsideration of Affirmation of Summary Judgment based upon Spoliation of Evidence, Appellate Court's reply was: "Rehearing Denied"--without further comment or explanation as to why Spoliation of Dispositive Evidence should be acceptable in a Federal Proceeding.

"I consider trial by jury as the only anchor yet imagined by man, by which a government can be held to the principles of its Constitution"--Thomas Jefferson.

CONCLUSION

The petition for an Extraordinary Writ of Mandamus To Reverse Summary Judgment should be granted.

Respectfully submitted,



Joseph A. Rodriguez, M.D.
Pro Se

Date: March 14, 2005

APPENDIX A

Appellate Judgment

[DO NOT PUBLISH]
IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-13851

D. C. Docket Nos. 99-07567-CV-DLG,
03-60070 CV-DLG

UNITED STATES OF AMERICA, ex rel.,
Plaintiff,
JOSEPH A. RODRIGUEZ,
Plaintiff- Appellee,
versus

HOLY CROSS HOSPITAL, INC.,
a Florida Corporation,
d.b.a. Holy Cross Medical,
d.b.a. Holy Cross Hospital,
HOLY CROSS HOSPITAL,
Defendants- Appellants.

No. 03-13551

D. C. Docket No. 03-60070-CV-DLG

JOSEPH A. RODRIGUEZ, M.D.,
Plaintiff- Appellant
cross-Appall
versus

HOLY CROSS HOSPITAL, INC.,
d.b.a. Holy Cross Medical Group,
HOLY CROSS HOSPITAL,
Defendants-Applies
Cross- Appellants.

Appeals from the United States District Court
for the Southern District of Florida

(October 22, 2004)

Before HULL and MARCUS, Circuit Judges, and MILLS, District Judge (Honorable Richard H. Mills, United States District Judge for the Central District of Illinois, sitting by designation).

HULL, Circuit Judge:

Plaintiff Joseph A. Rodriguez, M.D. ("Dr. Rodriguez") appeals the district court's grant of summary judgment to his former employer, Holy Cross Hospital, Inc. ("Holy Cross") and Holy Cross Hospital ("Hospital") on Dr. Rodriguez's claims of retaliation under the False Claims Act("FCA"), 31 U.S.C. §§ 3729 et seq., and breach of contract under state law. After review and oral argument, we affirm.

I. BACKGROUND

A. Alleged False-Claims Conduct

Dr.Rodriguez entered into a Physician Employment Agreement (the"Employment Agreement") with Holy Cross in December 1993, and began his employment with Holy Cross in January 4, 1994. The business of Holy Cross includes ownership and operation of the Hospital, Holy Cross Medical Group ("Medical Group"), and other healthcare-related businesses and facilities. When Dr. Rodriguez was hired, Holy Cross recently had purchased the medical practice of Dr. Enrique Morales for inclusion in its multi-practice Medical Group.According to Dr. Rodriguez's complaint ("the com plaint"), Dr. Rodriguez was hired specifically to replace Dr. Morales, who was to retire in March 1994.

Holy Cross administers the billing of :its businesses directly to Medicare and Medicaid. Prior to the purchase of Dr. Morales's practice, Ardelle Krauss administered the billing and performed a variety of medical services for Dr. Morales as his administrator and clinical assistant. According to Dr.Rodriguez, Holy Cross retained Krauss after Dr. Morales's retirement, and Krauss continued to administer billings for the practice, which consisted primarily of Medicare patients. In that capacity, Krauss presented "superbills" for Dr.Rodriguez's signature. In reviewing the grant of summary judgment to Holy Cross, we recite the facts in the light most favorable to Dr. Rodriguez. See Draper v. Reynolds., 369 F.3d 1270, 1272 n. 1 (11th Cir. 2004).According to Dr. Rodriguez, it soon became apparent to him that Krauss was altering diagnoses entered by him and that she was "upcoding" and padding superbills that she presented to him. Whenever Dr. Rodriguez discovered such alterations, upcoding and padding, he reinstated his diagnoses and corrected the coding of the bills to correspond with his diagnoses. As a result of Dr.Rodriguez's insistence upon correcting the bills,friction developed between Krauss and Dr. Rodriguez, and Krauss complained to the office administrator of Medical Group. Soon thereafter, Krauss informed Dr. Rodriguez that she and Holy Cross had agreed that Krauss would have final authority over the superbills and that Dr. Rodriguez no longer would be required to sign them prior to submission for payment. According to Dr. Rodriguez, he expressed to the Holy Cross administration his displeasure about the authority granted Krauss, but he "had no reason at that time to question the integrity of Holy Cross." Krauss continued to exercise final authority over surperbills until her resignation in December 1994.

Dr. Rodriguez states that in January 1995, after Krauss's departure, he found a patient's superbill, which had fallen from the inside back cover of a chart. According to Dr. Rodriguez, he reviewed the superbill and discovered that the diagnoses on the superbill were different from the two specific diagnoses for hyperlipidemia and small bowel obstruction that he personally had entered on the patient's chart. According to Dr. Rodriguez's Complaint, the diagnoses were wrongfully entered by Krauss on the superbill to justify her "unwarranted, unprescribed and unauthorized performance of and fraudulent billing for blood work, urinalysis, chest x-ray, stool hermoccult cards and a pap test charged on the superbill." Dr. Rodriguez further alleges that what appeared to be the rubberstamp signature of Dr. Morales, who had previously retired, appeared on the superbill above the words "Medicare filed." Dr. Rodriguez contends that he then concluded that Krauss's alteration of diagnoses and use of Dr. Morales's rubber stamp were part of a systematic scheme to circumvent him and to defraud the United States.

B. Dr. Rodriguez's Conduct

According to the Complaint, Dr. Rodriguez immediately disclosed Krauss's conduct to Dan Comrie, the Vice President of Physician Services for Holy Cross Hospital, and expressed concern that the incident was not isolated. On January 19, 1995, Dr. Rodriguez allegedly sent a letter to Comrie describing Krauss's conduct and expressing concern about the reaction of Medicare officials to that conduct, as follows:

> Dear Mr. Comrie:
> As you may recall, I was displeased with the level of cooperation, performance and attitude of former Holy

Cross Hospital employee and co-worker, Ardelle Krauss. My level of displeasure led to several conversations and meetings with you, Barbara Zimmerman, and Ms. Zimmerman's predecessor, Jeff Fulmer.

Among the topics discussed during said sessions was Mrs. Krauss's assertive autonomy in the service coding and billing process. Enclosed please find xerox copies of documents discovered by me today pertaining to one [redacted].

As the completed exam form reveals, 1 entered two diagnoses for this patient: hyperlipidemia and s/p SBO (small bowel obstruction).Mrs. Krauss took the liberty (without consulting me) of entering different diagnoses on the superbill. Her diagnoses would presumably justify performance of blood work., urinalysis, chest x-ray, stool hemoccult cards and a pap test for billing purposes. Rather than permitting me to review her superbill diagnoses and to validate the superbill with my signature, Mis. Krau:ss, again, took the liberty of using one of Dr. Morales's signature rubber stamps to validate the claim herself. (Dr. Morales had retired from clinical involvement in this practice two months prior to the [redacted] incident.)

I fear that [this] case is not the only one in which Ardelle Krauss conducted herself in the afore-mentimed fashion. I also suspect that Federal Medicare Officials would take a very dim view of the aforementioned coding and billing practice if they were made aware of it (e.g. during an outpatient P.R.O. (Peer Review Organization) random audit).

I remain at your service in efforts to promote the successful, efficient, ethical and lawful operation of this medical practice. How may I cooperate with you at this time?

Respectfully,
Joseph A. Rodriguez, M.D.
jar
Sent Certified Mail No. Z 3 10 293 075
P.S . - Should I make copy of this letter available to the Risk Management Dept?

C. Transfer and Termination

According to the Complaint, Comrie responded to the letter by assuring Dr. Rodriguez that he would correct the situation. Dr. Rodriguez then was transferred to a different medical practice (the "Shirk practice"), and subsequently to a third practice (the "Galt practice"). According to Holy Cross, these transfers were in an effort to improve Dr. Rodriguez's productivity, which was below expectation. Dr.Rodriguez admits that his productivity was low, and that he engaged in various discussions with Comrie and Mark Dissette, Holy Cross's Director of Physician
Relations, to discuss ways to improve his productivity.

In September or October of 1995, eight or nine months after the January 19, 1995, letter, Holy Cross transferred Dr. Rodriguez to a fourth medical practice (the "Pompano Clinic" or the "Bourque practice"), notwithstanding Dr. Rodriguez's concerns that the Pompano Clinic was a "substandard and intolerable clinical environment with substantial physician turnover." Dr. Rodriguez admits that it was his idea to work at the Pompano Clinic, covering for Dr. Bourque, over the summer of 1995 to improve his

productivity. Dr. Rodriguez asserts, however, that he adamantly opposed being transferred permanently to the Pompano Clinic and that after his transfer he continued to object and complain about "the medical risks facing patients at that clinic resulting from the daily processing of some one hundred patients by two physicians and one dentist working simultaneously side-by- side in a[] small, understaffed and congested facility."

Throughout the rest of 1995 and January and February of 1996, Dr.Rodriguez experienced problems in the Pompano Clinic and continued to express his concerns about conditions there to Comrie and Dissette. Holy Cross did not remedy Dr. Rodriguez's concerns, On February 19, 1996, shortly after a meeting at which Dr. Rodriguez again voiced to Comrie his problems with the Pompano Clinic, Cornrie delivered written notice to Dr. Rodriguez terminating his employment with Holy Cross.

D. Complaint

On November 23, 1999, Dr. Rodriguez filed a qui tam lawsuit against Holy Cross on behalf of the United States government under the FCA, alleging that Holy Cross fraudulently billed Medicare during his first year as a Holy Cross physician, and asserting whistleblower-retaliation claims under 31 U.S.C. 3730 (h) and breach-of-contract claims. On December 12, 2001, the United States intervened in the action and joined Dr. Rodriguez in stipulating to the dismissal with prejudice of the qui tam claim in-the Complaint. The United States' intervention was pursuant to a settlerment agreement under which Holy Cross was obligated to pay the United States $25,000 in exchange for release of the United States' FCA claims against Holy cross. Holy Cross expressly denied any and all liability.

The settlement agreement specifically allowed Dr. Rodriguez to proceed with his remaining personal claims, and on March 12, 2002, Dr. Rodriguez filed his two-count Complaint alleging retaliation and breach of contract. Holy Cross moved to dismiss the Complaint on statute-of-limitations grounds, but the district court. denied the motion. On November 19,2002, the district court closed the original qui tam case (Case No. 99-07567-CV) for administrative purposes, and ordered the Complaint opened under a new number (Case No. 03-60070-CV), with the United States no longer a party. The parties proceeded with discovery in the new case.

E. Comrie February 6, 2003, Deposition

Among the most critical evidence in the case was Comrie's deposition testimony given on February 6, 2003. In this deposition, Comrie averred that he had made the recommendation that Dr. Rodriguez's contract be terminated, Comrie further testified that his recommendation was based on the lack of a healthy, productive working relationship between Dr. Rodriguez and Holy Cross, as follows:

> Q. Mr. Comrie, earlier in your deposition, you testified that you were the person at Holy Cross Hospital who made the recommendation to terminate Dr. Rodriguez; is that right?
>
> A. That's correct.
>
> Q. Can you tell. us why you made that decision or that recommendation?

A. It was - it was apparent to me, in my opinion, that we did not have a healthy, productive working relationship that was developing between--by and amongst the medical goup and Dr.Rodriguez. I sincerely felt that given that, it was in the best interest of everyone concerned, including Dr. Rodriguez, to avail ourselves of the not for cause termination provisions in the contract, and part company.

Q. Was there an event that caused you to reach that decision?

A. It was a culmination of events . . . .

In his deposition, Comrie denied that Dr. Rodriguez's January 19, 1995, letter concerning Krauss's conduct played any role in the decision to terminate Dr. Rodriguez. Comrie further testified, however, that the difficulties Dr. Rodriguez had in the Morales practice and in the Bourque practice, in addition to low productivity, were significant factors leading to his termination:

Q. You mentioned that it was culmination of events that have started with the Morales practice, through the Shirk practice, and through the Bourque practice, that lead to Dr. Rodriguez's termination; is that correct?

A. Yes.

Q. The relationships that Dr. Rodlriguez had in the Shirk practice, that was not a significant factor leading to his termination; was it?

A. No. What the contributing factor in the Shirk experience was the, again, the productivity and the ability to get a base - get a following.

A. It included the Shirk practice, and to maybe clarify again, I don't recall the specific numbers, but I do recall that the number of patients that Dr. Rodriguez was seeing in the Shirk practice was not sustainable. It wasn't sustainable for him or for us.

Q. Were the difficulties that Dr.. Rodriguez had in the Morales practice and in the Bourque prac;tice significant factors leading to his termination.

A. Yes.

Previously in his deposition, Comrie had testified that the problems Dr. Rodriguez had in the Morales practice were, to his knowledge, "more of an interpersonal relationship issue with the office person there, Ardelle Krauss."

F. Summary Judgment

On February 18,2003, Holy Cross filed a motion for summary judgment, which the district court granted on April 23,2003. The district court concluded that Dr. Rodriguez's January 1 995 letter to Comrie regarding Krauss's alleged conduct constituted an intra-corporate complaint about fraud against the government, and thus was protected activity for purposes of the FCA. The district court further concluded, however, that Dr. Rodriguez failed to show that Holy Cross's allegedly retaliatory actions - transferring Dr. Rodriguez to the Pompano Clinic and then terminating his employment - were because of that protected activity. The district court concluded that Dr.

Rodriguez created a prima facie case of retaliation, but that he failed to present any evidence rebutting the legitimate, non-retaliatory reasons offered by Holy Cross for Dr. Rodriguez's transfer and termination. The district court thus granted summary judgment for Holy Cross on Dr. Rodriguez's FCA retaliation claim. Having granted summary judgment on that claim, the district court declined to exercise supplemental jurisdiction over Dr. Rodriguez's remaining state-law claim for breach of contract.

G. Motion for Relief or Reconsideration

On April 25,2003, two days after the district court's order granting summary judgment in favor of Holy Cross, Dr. Rodriguez filed a motion for relief from the summary judgment order or, in the alternative, for reconsideration of that order. The basis of Dr. Rodriguez's motion was a second deposition of Comrie, conducted on April 14,2003. During that deposition, Comrie testified that Dr. Rodriguez's January 19, 1995, letter regarding Krauss's alleged conduct was a factor in Dr. Rodriguez's termination, as follows:

> Q. Mr. Comrie, you were just asked a question as to whether there was a culmination of events which led to you recommendation that Dr. Rodriguez's physician employment agreement be terminated. Do you recall those questions?
>
> A. Yes.
>
> Q. What - Did those events that you're describing have anything to do with Dr. Rodriguez's January 19th, 1995, letter where he raised the billing issue concerning Ardelle Krauss?

A. Yes.

Q. How So?

A. That letter was - is part of a con-tinuum of negative behavior and a relationship that was not productive and constructive in working with Dr. Rodriguez.

Dr. Rodriguez's motion stated that the transcript from Comrie's April 14, 2003, deposition was unavailable until after the district court's April 23,2003, order granting summary judgment was entered. The motion asserted that Comrie's above testimony established that Dr. Rodriguez's termination was based at least in part on his protected activity, as required for an FCA retaliation claim, and sought relief from or reconsideration of the district court's summary judgment order on the basis of this "new" evidence.

The district court denied Dr. Rodriguez's motion for relief or reconsideration. The district court considered the motion under Rule 60(b) and stated that it could "see no significant distinction between the testimony offered from Comrie's first deposition and that offered from his second." The district court thus concluded that the deposition testimony did not satisfy Rule 60(b)'s newly discovered-evidence test.

H. Appeal

Dr. Rodriguez appeals the district court's order granting summary judgment and the district court's denial of his motion for relief or reconsideration. On cross-appeal, Holy Cross challenges the district court's conclusion that Dr. Rodriguez was engaged in activity protected by the

retaliation provision of the FCA. Holy Cross also appeals the district court's denial of its motion to dismiss on statute-of-limitations Grounds. Dr. Rodriguez's notice of appeal and Holy Cross's notice of cross-appeal were docketed in the renumbered and restyled district court case (Case No. 03-60070-CV) and were assigned Appeal No. 03-13551 in this Court. Because the district court's order denying Holy Cross's motion to dismiss was docketed in the original case (Case No. 99-07567-CV), Holy Cross's notice of appeal was docketed in that case and was assigned Appeal No. 03-13851 in this Court. The two appeals were then consolidated by this Court.

II. DISCUSSION

A. Summary Judgment

On appeal, Dr. Rodriguez argues that the district court erred in granting summary judgment. "We review the district court's rulings on motions for summary judgments de novo, applying the same legal standards that bound the district court." Jackson v. Bellsouth Telecomm., 372 F.3d 1250, 1279 (11th Cir. 2004). This Court, like the trial court, must view all evidence and all inferences therefrom in the light most favorable to the non-moving party, Burton v. City of Belle Glade, 178 F.3d 1175, 1187 (llth Cir. 1999) (internal quotation omitted), and "[I]ssues of credibility and the weight afforded to certain evidence are determinations appropriately made by a find of fact and not a court deciding summary judgment." McCormick v. City of Fort Lauderdale, 333 F.3d 1234, 1240 n. 7 (11th Cir. 2003). We first outline what a plaintiff must establish to recover on an FCA retaliation claim, and then examine whether the district court properly granted summary judgment.

Section 3730 (h) of the FCA protects any employee who suffers and adverse employment action "because of lawful acts"' by the employee in furtherance of an action under the FCA, stating in pertinent part:

> Any employee who is discharged. demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terns and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole.

31 U.S.C. 9 3730(h). To recover under § 3730(h), a plaintiff must show (1) that he engaged in conduct protected by the FCA; and (2) that he was discriminated against because of his protected conduct. United States ex rel. Yesudian v. Howard Univ., 153 F.3d 73 1,736 (D.C. Circ., 1998); Hutchins v. Wilentz, Goldman & Spitzer, 253 F.3d 176, I. 86 (3d Cir. 2001); see also McKenzie v. BellSouth Telecomm., Inc., 219 F.3d 508,514 (6th Cir. 2000).

A plaintiff can establish a prima facie case that he was discriminated against 'because of' conduct in furtherance of a False Claims Act suit by showing that (1) "his employer had knowledge he was engagcd in 'protected conduct'"; and (2) "his employer's retaliation was motivated, at least in part, by the employee's engaging in 'protected conduct."' Hutchins,, 253 F.3d at 186; see also Fanslow. v. Chicago Mfg. Center, Inc.,--F.3d --, 2004 WL 2085511, *13 (7th Cir. 2004); S.Rep. 99-345 at 35, reprinted in 1986 U.S.C.C.A.N. 5266,5300. "To meet the causal link requirement, the plaintiff

has to prove that the protected activity and the negative employment action are not completely unrelated. '" Nolifield v. Reno, 115 F.3d 1555, I566 (1 1 th Cir. 1997) (quoting E.E.O.C. v. Reichhold Chemicals. Inc., 988 F.2d 1564, I57 1-72 (11th Cir. 1993)) (applying test in Title VII retaliation case). When an employee establishes a prima facie case of retaliation (which includes showing that his employer's retaliation was motivated at least in part by the protected activity), the burden of proof shifts to the defendant employer to articulate a legitimate, non-discriminatory reason for the adverse employment action, see Holifield, 115 F.3d at 1566, and to show "that the same decision would have been made if the employee had not engaged in protected activity." Fanslow, - F.3d -, 2004 WL 20855 11 at *13 (quoting Yesudian, 153 F.3d at 736 n.4).

Here, the district court concluded that Dr. Rodriguez established that he engaged in protected activity, ie, the January 19, 1995, letter, that Holy Cross was aware of it, and that Dr. Rodriguez suffered adverse employment actions (transfer and termination). The district court thus concluded that Dr. Rodriguez established a prima facie case of retaliation, and that the burden shifted to Holy Cross to articulate a legitimate reason for Dr.. Rodriguez's transfer and termination. The district court then concluded that Holy Cross met its burden, and granted summary judgment to Holy Cross al. that basis. Even assuming (without deciding) that Dr. Rodriguez established a prima facie case of retaliation, we conclude that the district court properly granted summary judgment because Holy Cross established legitimate reasons for his transfer and termination, and further showed that Dr. Rodriguez would have been transferred and terminated absent his protected conduct. Dr. Rodriguez failed to present any contrary evidence, and in fact his own testimony supports Holy Cross's position.

With regard to the transfer, the evidence shows that Holy Cross transferred Dr. Rodriguez to the Pompano Clinic in September or October 1995 in an effort to increase his productivity and patient levels, and to fill an open spot. According to Holy Cross, Dr. Rodriguez was well-suited to the practice because he is able to communicate with the Pompano Clinic's French Canadian patients. Dr. Rodriguez does not dispute that his productivity levels prior to the transfer were below expectation; nor does he dispute that his productivity levels increased after the transfer. Indeed, in his deposition Dr. Rodriguez adrmtted that he had several meetings with Comrie and with Mark Dissette, Holy Cross's Director of Physician Relations, to discuss ways in which he could improve his productivity. In those discussions, it was Dr, Rodriguez, and not Comrie or Dissette, who first suggested
that Dr, Rodriguez increase his numbers by working (albeit temporarily) at the Pompano Clinic during July and August of 1995. Dr. Rodriguez further admits that thereafter, Dissette suggested to Dr. Rodriguez that the high volume of the Pompano Clinic practice would be beneficial to Dr. Rodriguez's productivity, and ultimately informed Dr. Rodriguez in August of 1 995 that he would be transferred to the Pompano Clinic.

Given Dr. Rodriguez's failure to provide any evidence undermining Holy Cross's proven reason for the transfer, and given his admissions that (1) prior to the transfer, he was working with Holy Cross to improve his productivity, which was rated below expectation, (2) Dr. Rodriguez himself originally suggested that he work at the Pompano Clinic (albeit temporarily) to improve his productivity, and (3) Holy Cross consistently represented to him that his transfer was intended to increase his productivity, we

readily conclude that Holy Cross satisfied its burden of proving that Dr. Rodriguez would have been transferred absent the protected conduct, that no genuine of issue of fact remains, and that the district court properly granted summary judgment m this issue.

With regard to Dr. Rodriguez's termination, Holy Cross's termination of Dr.Rodriguez was the result of a combination of factors, including Dr. Rodriguez's unwillingness to work more than the forty hours per week required by his contract, his lack of productivity, his acrimoi1ious relationships with various Holy Cross employees, including but not limited to Krauss, and his negative, unproductive attitude. Again, Dr. Rodriguez fails to identify any evidence presented to the district court contradicting these reasons or suggesting that he would not have been terminated but for his protected conduct. The only evidence that Dr.Rodriguez claims demonstrates retaliatory intent is Comrie's deposition testimony that the "difficulties that Dr. Rodriguez had in the Morales practice" in early 1995 were among the factors leading to his termination. Even assuming that those difficulties were limited to his relationship with Krauss (a dubious assumption in light of Dr. Rodriguez's admittedly low productivity in that office), Comrie's statement does not undermine Holy Cross's assertion that it terminated Dr. Rodriguez in February 1996 for legitimate reasons. Dr. Rodriguez worked with Krauss on a daily basis, and Comrie's acknowledgment that Dr. Rodriguez had an "interpersonal relationship" problem with Krauss does not by itself suggest that the protected January 19, 1995, letter--a single occurrence in their relationship--caused Dr. Rodriguez's termination in February 1996.

Indeed, the evidence presented to the district court - including Dr. Rodriguez's deposition testimony -

overwhelmingly shows that Dr. Rodriguez's February 1996 termination was based primarily on his conduct at the Pompano Clinic and that the same decision would have been made even if Dr. Rodriguez had not engaged in the protected conduct. First, Dr. Rodriguez was terminated more than a year after the protected activity. While this lack of temporal proximity alone does not defeat Dr. Rodriguez's claim, it does cast doubt on the requisite causation. More importantly, as set forth more specifically below, Dr. Rodriguez effectively admitted that his relationship with Holy Cross spiraled downward after his transfer to the Pompano Clinic, that Holy Cross administration consistently expressed dissatisfaction with his productivity, and that he ultimately refused to continue working at the Pompano Clinic under then-existing conditions.

In his deposition testimony, Dr. Rodriguez also admitted that he had a series of problems at the Pompano Clinic, including one incident in the fall of 1995 in which a patient with a severe earache and fever was made to wait in the waiting room for three hours while Dr. Rodriguez attended a meeting. The patient's husband contacted the hospital attorney and the licensing board to complain about the incident, apparently blaming Dr. Rodriguez. After this and other incidents, Dr. Rodriguez met with Dissette and Holy Cross attorney Jerry Morris to discuss Dr. Rodriguez's concerns about the Pompano Clinic, including his concerns that he or his office would commit negligence as a result of the environment.

Furthermore in January of 1996, Dissette continued to express concern about Dr. Rodriguez's low productivity and patient back-up. Dissette made various suggestions to remedy this problem, including working longer hours. Dr. Rodriguez, however, told Dissette that his contract required

that he work on average forty hours per week, and that he was unwilling to work any more than that requirement. Dr. Rodriguez stated that Dissette was not pleased with his "invoking the contract."

In late January or early February of 1996, Dr. Rodriguez had another bad experience with a patient. According to his deposition testimony, Dr. Rodrjguez told Dissette about the problem and again expressed his conceins about the "risky" environment. Specifically, he told Dissette, "'look, Mark, we talked about this repeatedly on this dangerous environment, risky environment for me, and I'm know how much of this I can put up with, I just can't do it." Dr. Rodriguez explained to Dissette what the problem had been, and Dissette seemed alarmed and said he would set up a meeting with Comrie.

Dissette set up a meeting with Comrie within the next few days, in late January or early February of l996. According to Dr. Rodriguez's testimony, he expressed to Comrie at that meeting that the Pompano Clinic was a very stressful and unpleasant place for him to work. At that point, according to Dr. Rodriguez's account, Comrie "exploded," and stated that Dr. Rodriguez was defaming the hospital and defaming Dr. Bourque and the way the clinic was run. Dr. Rodriguez informed Comrie that the situation in the Pompano Clinic was unworkable and that it was dangerous for him to work in that environment, and proposed to Comie a "co-venture" with the hospital under which Dr. Rodriguez could move to another setting, referring cases back to the hospital, but maintaining control of his own environment. According to Dr. Rodriguez, however, Comrie told him that such a "co-venture" was not "in the cards." Shortly thereafter, Holy Cross terminated Dr. Rodriguez on Febxuary 19, 1996.

Based on this evidence, the district court did not err in concluding that no reasonable factfinder could find for Dr. Rod.riguez on his FCA retaliation claim. Dr. Rodriguez's own testimony shows that IIoly Cross was consistently dissatisfied with his productivity, that Dr. Rodriguez was unwilling to work longer hours to improve his productivity; that his relationship with Dissette and Comrie deteriorated after his transfer to the Pompano Clinic, months after the protected activity; that the deterioration of that relationship resulted from Dr. Rodriguez's dissatisfaction with and complaints about his employment; and that Dr. Rodriguez's termination occurred shortly after he expressed his view that his employment situation was unworkable. Indeed, Dr. Rodriguez expressed that it would be dangerous for him to continue in his emnployment. Whether Dr. Rodriguez's criticisms of the Pompano Clinic were valid is immaterial. His criticism of and poor relationship with management were not protected activity, and Holy Cross was free to terminate him on those bases. This testimony thus fully supports Holy Cross' s position that Dr. Rodriguez was terminated because of his low productivity and because his relationship with Holy Cross was, in Holy Cross's view, not constructive. Under these circumstances, Dr. Rodriguez has failed to create any genuine issue of fact on this issue.

We recognize that Dr. Rodriguez asserts Holy Cross's proffered reasons are belied by the following facts: (1) Dr. Rodriguez's productivity increased at the Pompano Clinic prior to his termination; and (2) his productivity was expected to be fairly low when he began at the Morales practice because patient attrition was expected when Dr. Morales retired. In light of the other testimony described above, we find neither of these facts compel1ing. Dr. Rodriguez admits that Dissette was displeased with his productivity levels throughout his employment, even at the

Pompano Clinic, notwithstanding any improvement. The fact that a degree of his low productivity at the Morales practice was unsurprising does not undermine Holy Cross's position that it was displeased with his overall productivity levels, particularly given the wealth of evidence of Holy Cross's dissatisfaction with Dr. Rodriguez's conduct at the Pompano Clinic. Accordingly, neither of the facts presented by Dr. Rodriguez rebuts Holy Cross's assertion that it terminated Dr. Rodriguez as a result of his low productivity, negative attitude, and interpersonal problems.

Because Holy Cross met its burden of proving that Dr. Rodriguez would have been transferred and terminated absent his protected conduct and Dr.Rodriguez failed to present to the district court any contrary evidence - and in fact presented evidence supporting Holy Cross's position - the district court properly granted summary judgment in favor of Holy Cross.

B. Motion for Relief or Reconsideration

Dr. Rodriguez next argues that the district court abused its discretion in denying his motion for. relief from or reconsideration of the summary judgment order. This Court reviews the denial of a motion for relief from judgment or for reconsideration for an abuse of discretion. See Morris Comm. Corp. v. PGA Tour, Inc., 364 F.3d 1288, 1292 (11th Circ. 2004) (denial of Rule 60 motion reviewed for abuse of discretion): Lockard v. Equifax, Inc., 163 F.3d 1259, 1267 (11th Circ. 1998) (denial of Rule 59 motion for reconsideration reviewed for abuse of discretion). As a threshold matter, we must determine whether Dr. Rodriguez's motion is best characterized as a Rule 59 or a Rule 60 motion. The motion was labeled a Rule 60 motion for relief from judgment, and both parties and the district

court treated it as such. Nevertheless, "[n]omenclature does not control the legal status of a post-trial motion." Livernois v. Medical Disposables, Inc., 837 F.2d 1018, 1020 (I lth Cir. 1988) (citation omitted). Instead, "[a] post-judgment motion may be treated as made pursuant to either Fed.R.Civ.P. 59 or 60--regardless of how the motion is styled by the movant--depending on the type of relief sought." Mays v. United States Postal Serv.., 122 F.3d 43,46 (11 lth Cir. 1997).

Here, the relief sought was reconsideration of the summary judgment order, vacation of that order, and trial on the merits -- relief available under Rule 59. See Mays, 122 F.3d at 46 (concluding that a motion seeking the setting aside of a summary judgment order, denial of the motion of summary judgment, and trial on the merits was properly characterized as a Rule 59 (e) motion to alter or amend the judgment rather than a Rule 60 motion for relief from the judgment). In addition, Rule 60's new-evidence provision states that a court may grant relief from a judgment on the basis of "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 5 9(b)." Fed. R. Civ. P. 60(b). Dr. Rodriguez's motion was filed only two days after the summary judgment order, well within Rule 59(b)'s ten-day filing period. Fed. R Civ. P. 59(e) ("Any motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment."); Fed. R. Civ. P. 59(b) (ten-day filing period for new-trial motions). Thus, we construe Dr. Rodriguez's motion as a Rule 59 motion and not a Rule 60 motion. We note that the result--affirming the denial of Dr. Rodriguez's motion--would be the same under Rule 60.

In his Rule-59 motion,Dr.Rodriguez sought reconsideration based on the "new" evidence obtained at Comrie's April 14,2003, deposition. However, the district court properly

determined that the evidence was not new. In its order, the district court determined that the evidence was not new because there was "no significant distinction between the testimony offered from Comrie' first deposition and that offered from his second." It is not entirely clear from the district court's order whether the district court (1) declined to consider the evidence because it was not new or (2) considered the evidence and determined that it would not alter the outcome of the summary judgment motion. In either case, the district court properly denied the motion.

To the extent the district court declined to consider the evidence because it was not new: we note that the evidence was in fact available during the pendency of the summary judgment motion. Even assuming, as Dr, Rodriguez asserts, that the transcript of Comrie's deposition was unavailable prior to the district court's April 23,2003, summary judgment order, Dr. Rodriguez had the opportunity to apprise the district court of Comrie's testimony in the nine-day period between Comrie 's deposition and the entry of the summary judgment order. Indeed, Dr.Rodriguez was on notice during that period that an order on the summary judgment motion soon would be entered. In his Rule 59 motion, Dr. Rodriguez stated that on April 15,2003, the day after Comrie's deposition, "the court advised counsel for Plaintiff and counsel for Defendant not to appear for calendar call and indicated that an order would be forthcoming." This Court previously has concluded that "where a party attempts to introduce previously unsubmitted evidence on a motion to reconsider, the court should not grant the motion absent some showing that the evidence was not available during the pendency of the motion." Mays, 122 F.3d at 46. Accordingly, because Comie's testimony was available prior to the summary judgment order, the district court was not required to consider it.

In any event, to the extent the district court did consider the new evidence, the district court properly determined that Comrie's second-deposition testimony is not significantly different from his first-deposition testimony. In the second deposition, in response to the question of what Dr. Rodriguez's protected letter had to do with the events leading to his termination, Code testified: "That letter was - is part of a continuum of negative behavior and a relationship that was not productive and constructive in working with Dr. Rohguez." This testimony indicates only that the letter was one point in the extensive pattern of activity described above that led to Dr. Rodriguez's termination. In light of the extensive, overwhelming evidence presented to the district court--including Rodriguez's own testimony-supporting Holy Cross's legitimate termination reasons, Holy Cross has satisfied its burden of proving that Dr. Rodriguez would have been terminated in the absence of the protected conduct. See, e.g., Fanslow, - F.3d -, 2004 WL 2085511 at * 13 (employer bears burden of proving that the same decision would have been made even if the employee had not engaged in protected activity). Viewing the wealth of evidence that Dr. Rodriguez's termination was caused by the events during his placement at the Pompano Clinic, no reasonable jury could conclude that his termination was "because of" the protected activity.Accordingly, summary judgment for Holy Cross was appropriate, and the district court properly denied Dr. Rodriguez's motion for reconsideration.

III. CONCLUSION

For all the reasons stated above, we affirm the district court's orders granting summary judgment to Holy Cross on Dr. Rodriguez's FCA retaliation claim under § 3730 (h) and

denying Dr. Rodriguez's motion for relief from or reconsideration of that order. Because we affirm the district court's summary-judgment order, we need not address the statute-of-limitations and protected-activity issues raised by Holy Cross on appeal.

AFFIRMED.

APPENDIX B

District Court Judgment

UNITED STATE DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 03-60070-CIV-GRAHAM/GARBER

JOSEPH A. RODRIGUEZ,
Plaintiff,

vs.

HOLY CROSS HOSPITAL, INC, a Florida corporation d/b/a HOLY CROSS ME;DICAL GROUP and HOLY CROSS HOSPITAL,
Defendants.

ORDER

THIS CAUSE came before the court upon Defendant's Motion for Final Summary Judgement, filed February 18, 2003.
THE COURT has considered the Motion and the pertinent portions of the record and is otherwise f u l l y advised in the premises.

INTRODUCTION

This action arises out an employment dispute between Plaintiff Joseph A. Rodriguez, M.D. ("Dr. Rodriguez") and his former employer, Holy Cross Hospital, Inc., a Florida corporation d/b/a Holy Cross Medical Group (the "Medical Group") and Holy Cross Hospital (collectively "Holy Cross") . The Complaint alleges a federal claim for retaliation under 31 U.S.C. § 3730 (h) of the False Claims Act ("FCA") (Count I) and a pendent s t a t e law claim f o r breach of contract

related to Holy Cross' alleged failure to make a) incentive compensation,. b) deferred compensation and c) paid time off payments to Dr. Rodriguez (Count II).

BACKGROUND

According to Plaintiff, in December 1993, Holy cross purchased the medical practice of Enrique Morales, M.D. for inclusion in the Medical Group, a multi-practice group of physicians specializing or practicing in various disciplines of medicine. On December 10, 1993, Holy Cross entered into a Physician Employment Agreement (the "Employment Agreement") with Dr.. Rodriguez who commenced employment with Holy Cross in January 1994.. According to the Complaint, Dr. Rodriguez was asked t o join the practice specifically to replace Dr. Morales, whose March 1994 retirement had been anticipated when Holy Cross acquired the Morales practice.

Ardelle Krauss, who had previously administered the billing and performed a variety of medical services for Dr. Morales as his administrator and clinical assistant, was retained as an employee of Holy Cross after Dr. Morales retired. According to the Plaintiff, M r s . Krauss continued to administer billings for the practice and, in that capacity, routinely presented superbills to Dr. Rodriguez for his signature. According to the Complain it became apparent t o Dr. Rodriguez that Mrs. Krauss was altering diagnoses entered by him and that she was upcoding and padding s up e r b i l l s that she presented to him. According to Plaintiff, when he observed such alterations, upcoding or padding, he reinstated the actual diagnoses and corrected the coding of the bills to correspond with the proper diagnoses. As a result of Plaintiff's insistence upon c o r r e c t i n g t h e b i l l s , friction assertedly developed between

him and Mrs. Krauss, causing Mrs. Krauss to complain about his conduct to Holy cross office administrator Barbara Zimmerman. According to the Complaint, the Medical Group's administrative policy was soon thereafter altered whereby M r s . Krauss was given f i n a l authority to sign the superbills. According to plaintiff, he expressed displeasure to the Holy Cross administration about the authority granted to M r s . Krauss in the coding and b i l l i n g process but he had no reason at that time to question the integrity of Holy Cross. According to Plaintiff, .the new billing procedure continued through the date of Mrs. Krauss' resignation in December 1994.

In January 1995, subsequent t o Mrs. Krauss' departure, P l a i n t i f f assertedly found the superbill of one of his patients which had fallen from the inside back cover of a chart. According to the Plaintiff, he reviewed the b i l l and discovered that the diagnoses on the superbill. were different from the two specific diagnoses for hyper1ipidemia and small bowel obstruction that he had personally entered on the patient's chart. According to the Complaint, the diagnoses were wrongfully entered by Mrs. Krauss on the superbill to justify her "unwarranted, unperscribed and unauthorized performance of the fraudulent billing for blood work,urunalysis, chest x-ray, stool hemoccult cards and a pap test charged on the superbill." Additionally, according to Plaintiff, he observed that the rubber stamp signature of previously retired Dr. Morales appeared on the superbill above words "Medicare f i l e d." At that time, Plaintiff contends, he concluded that altered diagnoses entered by Mrs. Krauss and the use by her of the rubber stamp of Dr. Moralas, notwithstanding his retirement from the practice some two months before, was part of a systematic scheme to circumvent Plaintiff and to defraud the United

States and its agencies.

According to the Complaint, Plaintiff immediately disclosed this conduct verbally to the Vice President of Physician Services f o r Holy Cross, Dan Comrie, as well as other o f f i c i a l s of Holy Cross, and expressed concern that the incident was probably not an isolated one. On Janaary 19, 1995, plaintiff sent a letter to Mr, Comrie wherein he stated as follows:

> As you may recall, I was displeased with the level of cooperation, performance and attitude of former Holy Cross Hospital, employee and co-worker Ardelle Krauss. My level of displeasure led to several conversations and meetings with you, Barbara Zimmerrnan, and Ms. Zimmerman's predecessor, Jeff Fulmer. Among the topics discussed during said sessions was Mrs. Krauss' assertive autonomy in the service coding and billing process. Enclosed please find xerox copies of documents discovered by me today . . .
> As the campleted exam form reveals, I entered two diagnoses for this hyperlipidemia and s/p SBO (small bowel obstruction) Mrs. Krauss took the liberty (without consulting me) of entering different diagnoses on t h e superbill. Her diagnoses would presumably j u s t i f y performance of blood work, urunalysis, chest x-ray, stool hemoccult cards and a pap t e s t for billing purposes. Rather than permitting me t;o review her superbill with my signature, Mrs. Krauss, again, took the liberty of using one of Dr, Mbrales' s signature rubber stsmps to validate the claim herself...
> I fear that [t h i s] case is not the only one in which Ardelle Krauss conducted herself in the aforementioned fashion. I also suspect that Federal Medicare o f f i c i a l s would take a very dim view of the aforementioned

coding and b i l l i n g practice if they were made aware of it (e.g. during an outpatient P. R. 0. (Peer Review Organization) random audit).

I remain at your service in efforts to promote successful, e f f i c i e n t , et:hical and lawful operation of t h i s medical practice. How may I cooperate with you at this time?

According to the Complaint, in response t o the letter, Dan Comrie assured P l a i n t i f f that he would remedy the situation.

According to the Complaint, approximately two months a f t e r receiving Dr. Rodriguez's January 19, 1995 letter, Mr. Comrie suggested to Dr. Rodriguez that he transfer to another medical practice known alternatively as the Intermed, Bourque or Oceanside Medical Practice (the "Pompano Clinic"). According to the Complaint, Holy Cross transferred Dr Rodriguez to the Pompano Clinic notwithstanding his concerns that the move was to a high volume, substandard practice with significant medical and legal r i s k s as well as substantial physician turnover. According to the Complaint, Dr. Rodriguez was essentially demoted do an assistant physician in the Pompano Clinic. In February 1996, Plaintiff 's employment with Holy cross was terminated.

Plaintiff alleges that after the termination of his employment with Holy Cross, Holy Cross knowingly continued to use Plaintiff's name and provider identification number facilitating payments to Holy Cross for services performed by unauthorized physicians.

PROCEDURAL BACKGROUND

On November 23, 1999, Dr. Rodriguez filed, under seal, an action on behalf of the United States government under the qui tam provisions of the FCA. Dr. Rodriguez's FCA claims alleged that Holy Cross, through the alleged actions of Holy Cross employee, Ardelle Krauss, fraudulently billed Medicare during his first year as a Holy Cross physician employee. Dr. Rodriguez also asserted employment-related claims for whistle blower retaliation under 31 U.S.C. S 3730 (h) of the FCA and breach of contract claims related to his Employment Agreement with Holy Cross.

According t o the Complaint, on December 12, 2001, the United States of America intervened in. the action for the sole purpose of joining with Dr. Rodriguez and stipulating to the dismissal with prejudice of the qui tam claims in Counts I and 11. Intervention was assertedly based upon a settlement agreement wherein Holy Cross agreed to pay the United States $25,000.00 in exchange for release of the FCA claims, for which Holy Cross expressly denied any and all liability in the settlement agreement.

Dr. Rodriguez ' s employment claims remained after settlement of the FCA claims, and on March 12, 2002, he f i l e d a Second ammended verified Qui Tam Complaint. The Complaint contains two counts: a federal claim for retaliation under the FCA (Count I) and a pendent state law claim for purported breach of contract related to Holy Cross' alleged failure to make a) incentive compensation, b) deferred compensation and c) paid time off payments to Rodriguez (Count 11) .

On February 1 8 , 2003, Holy Cross moved for final summary judgment on a11 of Dr. Rodriguez's claims. Holy Cross contends that the undisputed facts show that Dr. Rodriguez did not engage in protected activity because the

alleged improper billing activities he brought to Holy Cross' attention were not related to false or fraudulent medicare billing by Holy Cross, and therefore, there was no distinct possibility of a FCA claim. Further, Holy Cross contends that there was no distinct possibility of an action under the FCA because Dr. Rodriguez did nothing during his employment in furtherance of an action under the FCA. Moreover, Holy Cross contends that: it had no knowledge of any protected activity by Dr. Rodriguez. Holy Cross also contends that it had a legitimate, nonretaliatory reasons for it s decisions w i t h respect to Dr. Rodriguez's employment. Finally, Holy Cross contends that there exists no genuine issue of material fact on Dr. Rodriguez's breach of contract claims as Dr. Rodriguez received a l l deferred compensation and incentive compensation he was owed under his Employment Agreement, and was not entitled to payment for unused paid time off at t h e time his employment with Holy Cross was terminated.

STANDARD OF REVIEW

Summary judgment may be granted when the evidence in the record establishes t h a t there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed R.Civ.P. 50) . The moving party has the
burden of production. See Adickes v, S .H. Kress & Co., 398. U.S. 144, 157 (1970). when the moving party has met this burden by offering sufficient evidence to support the motion, the party opposing must then respond by attempting to establish the existence of a genuine issue of material fact. See Adickes, 398 U. S ,. at 160.

In making this determination, the Court must decide which issues are material. The Supreme Court has stated that

"[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, l06 (l986).

The Court must also determine whether the dispute about a material fact is indeed genuine. In other words, is the "evidence
. . . such that a reasonable jury could return a verdict far the non-moving party." Anderson, 477 U. S. at 248; Marine Coatings of Alabama. Inc. v. United States, 932 F.2d 1370, 1375 (11th Cir. 1991) (dispute of fact is "genuine" if the evidence is such that a reasonable jury could return a verdict f o r the non-moving party).

F i n a l l y , a plaintiff cannot defeat a motion f o r summary judgement by r e s t i n g on the conclusory allegations in the pleadings. See Fed. R. Civ. P, 56 (e) ; Anderson v. Liberty Lobby, Inc.,47 U-S- at 248. Nor will a summary judgment motion be defeated merely on the basis of a "metaphysical doubt" about the material facts, See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (19861, "or on the basis of conjecture or surmise." Bryant v. Maffucci, 923 F.2d 979, 982 (2nd Cir. 1991), cert. den., 502 U.S. 849 (1991).

THE FCA § 3730 (h) RETALIATION CLAIM

The law is settled that to show a violation of the FCA the evidence must demonstrate "guilty knowledge of a purpose on the p a r t of (the defendant) to cheat the Government, " United States v. Priola, 272 F.2d 589, 594 (5th Cir. 1959), or "knowledge or guilty intent," United States v. Ridglea State Bank, 357 F.2d 495, 498 (5th Circ. 1966). See also Henry v. United States, 424 F.2d 677 (5th Circ. 1970).

The retaliation provision of the FCA states in relevant part: "Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner: discriminated against in the terms of employment by his or her employer becauae of lawful acts done by the employee on behalf of his e:tnployer or others in furtherance of an action under this seetion, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make employee whole." 31 U.S.C. § 3730 (h) . This "whistleblower" provision was enacted to protect employees who assist the government in the investigation and prosecution of violations of the FCA.

In order to bring a claim of retaliatory discharge and violations of the FCA. The plaintiff must show that he engaged: (1) in conduct protected under the FCA; (2) defendant was aware of the plaintiff's actions: and (3) plaintiff was terminated in r e t a l i a t i o n for his conduct., Yesudian v. Howard University, 946 F.Supp. 31 (D.D.C, 1996) (citing Mikes v. Strauss, 889 F.Supp. 746, 752 (S.D.N.Y. 1995). United States ex rel. McKenzie v. Bellsouth Telecom., Inc., 123 F.3d 935 (6th Cir. 1997), cert. denied, 522 U S . 1077, 118 S .Ct. 655, 139 L,Ed.2d 755 (1998). As will be explained, the Court finds that Dr- Rodriguez has established that his conduct was protected, at least to an extent sufficient to survive summary judgment. However, because he cannot establish a causal connection between the protected conduct and the adverse actions he suffered, summary judgment on this claim will be granted.

Protected Conduct

Section 3730 (h) protects a plaintiff's conduct "in furtherance of an "action" under the FCA. A plain reading of the statute suggests that, to be protected, the p l a i n t i f f s conduct must be, at least, incident to an actual lawsuit "filed or to be f i l e d" under the FCA. The type of "action" toward which the conduct must be directed is an "action f i l e d or to be filed" by the federal government pursuant to § 3730 (a) or a qui tam "action filed or to be filed by the p l a i n t i f f o r someone else pursuant to § 3730 (b). In addition, the t y p e of conduct protected is limited to that which would f a l l within the breadth of that outlined by the examples given in §3730(h), that is, "investigation for" such a lawsuit f i l e d or to be filed, "initiation of" such a lawsuit filed or to be filed, "testimony for such a lawsuit f i l e d or to be filed, and "assistance in" such a lawsuit filed or to be f i l e d . 31 U.S.C,A. 3730 (h) .

Distinct Possibility

Courts have, however, rejected such a narrow reading of the statute, Instead, they have b:roadly interpreted the statute t o provide protection in cases in which the p l a i n t i f f did not even .know of the FCA or that her conduct was protected, as long as FCA litigatian was a 'distinct possibility' when the plaintiff acted. Childree v. UAP/GA AG CHEM. Inc, 92 F.3d 1140, 1146 (11th C i r. 19961), cert. denied, 519 U.S. 1148, 117 S.Ct. 1080, 137 L. Ed . 2 d 216 (1997) ; Neal v. Honeywell. Inc. . , 33 F.3d 860, 864 (7th Cir. 1994); see also Yesudian, 153 F.3d at 740 (t o be protected, p l a i n t i f f need not have known of FCA as long as "plaintiff [was] investigating matters that 'reasonably could lead' to a viable FCA suit") ; United States ex. rel. Hopper v. Anton, 91. F.3d 1261, 1269 (9th C i r . 1996) ("plaintiff must be investigating matters which are calculated, or

reasonably could lead, to a viable FCA action"), cert. denied, 519
U.S. 1115, 117 S.Ct, 958, 136 L.Ed.2d 844 (1997).

Though courts have determined that in defining "protected activity taken in furtherance of an action "filed or to be filed, "employees need not actually f i l e a FCA claim to assert action under §3730 (h), it is difficult to define "distinct: possibility." One case in which litigation would be a "distinct possibility" is clear: where the plaintiff knew of the FCA and told his employer that he was contemplating filing and FCA action or reporting fraud to the government. However, where the p l a i n t i f f did not know about the FCA or did not tell his employer that he was contemplating legal action, the correct application of the "distinct possibility" test is much more d i f f i c u l t.

The difficulty of applying the "distinct possibility" concept is illustrated by the Eleventh Circuit's application of the concept in Childree,, 92 F.3d at 1146, 1314. There, on the one hand, the appellate court broadly held that a plaintiff need not even know of the FCA in order to invoke its protections as long as litigation was a distinct possibility when she acted. On the other hand, the
court specifically concluded t h a t "filing a § 3730 (h) qui tam action was never a distinct possibility because the plaintiff "concedes she never even considered it." Id.

Defendant Holy Cross has failed to allege that Dr. Rodriguez had no knowledge of the FCA and t h a t he never considered filing an action against Holy Cross. In the absence of evidence that the employee knew about the FCA and in the absence of evidence that the employer actually contemplated retaliatory action against the employee, the Court must examine whether the employee engaged in

conduct from which a factfinder could reasonably conclude that the employer could have feared that the employee was contemplating filing a qui-tam action against it or reporting the employer to the government for fraud. For, without this circumstance, these would be no basis to conclude that the employee harbored the prohibited motivation. Therefore, litigation would have been a "distinct possibility" only if the evidence reasonably supports such fear. If the evidence does not support this fear, litigation would not have been a distinct possibility.

Under this approach, the Court will look for evidence that Dr. Rodriguez, either by words or actions, communicated to Holy Cross that he believed that Holy Cross had engaged in illegal or fraudulent conduct involving the submission of Medicare claims for payment to the government. Such a showing could be made, for example, by evidence that Dr. Rodriguez characterized Holy Cross as "illegal" or "fraudulent" or recommended that legal counsel become involved. See e.g. Eberhardt, 167 F. 3d 861, 868-69. The determinative issue will be whether Holy Cross could have, based upon a reasonable interpretation of Dr. Rodriguez's conduct, feared that he was contemplating taking legal action under the FCA or reporting fraud to the government. This approach generally accords with that taken by a number of other courts. See ,Eberhardt, 167 F.3d at 867-869; Yesudian, 153 F.3d at 741-45 (D.C. Cir.); McKenzie, 123 F.3d at 944 (6th Cir.) ; Neal, 33 F.3d at 863-865 (7th Cir.) .

It is undisputed that while employed at Holy Cross, Dr. Rodriguez did not tell anyone at Holy Cross that he intended to file an FCA claim or report fraud to the government. Thus, the Court must determine whether Dr , Rodriguez's conduct could have led Holy Cross reasonably to fear that he was contemplating bringing a qui tam action

o r reporting fraud to the government. By reporting M r s . Krauss' alleged misconduct to M r . Comrie, Dr. Rodriguez's conduct indicates that he believed Mrs. Krauss' conduct to be improper in the least. It is unclear from the record, however, whether Dr. Rodriguez gave any indication that he thought Mrs. Krauss' canduct was illegal, In his l e t t e r to Mr. Comrie, Dr.Rodriguez states t h a t he suspects that "Federal Medicare o f f i c i a l s would t a k e a very dim view of t h e aforementioned coding and billing practice if they were made aware of it." Defendant argues, however, that this contention was insufficient to indicate that it should fear an FCA claim would be filed by Dr. Rodriguez. Defendant argues that a l l of the cases analyzing the "protected activity" standard make clear that mere intra-office complaints without assistance to the government or activity in furtherance of a private qui tam claim are not; sufficient f o r protection under § 3730(h). Several d i s t r i c t courts have held, however, that 3730(h) protects internal whistleblowers who make intra-corporate complaints about fraud against the government. See, e.g., Clemes v. Del Norte County Unified Sch. D i s t . , 843 F.Supp. 583, 595-96 (N.D.Cal. 1994) ; United States ex rel. Kent Aiello, 836 F.Supp.7 2 0 , 723-24 (E.d.Cal. 1993) Neal, 826 F.Supp. at 269-73. In each of these cases the employee told the employer that he w a s concerned about the company defrauding the government. For instance, in Neal, the court explained that it wauld make l i t t l e sense to protect an anonymous qui tam plaintiff who filed an expensive and time-consuming lawsuit while ignoring someone l i k e the Plaintiff, whose bold conduct led to a quick, voluntary and efficient disclosure of the fraud and reparation to the government."

The Court must therefore determine whether Plaintiff's January 1995 l e t t e r to Mr. Comrie qualifies as an intra-corporate complaint about fraud against the government.

While Dr. Rodriguez did not use the words "illegal" or "fraudulent" in his le t t e r , the Court finds that his expression of concern to Mr. Comrie which gave Holy Cross notice of practices t h a t he believed "Medicare officials would take a very d i m view of" is sufficient to warrant an intracorporate complaint about fraud against the government. As such, his expression was a protected activity.

Causal Connection

To prevail on a FCA retaliatory claim, a plaintiff must also demonstrate a causal connection between his protected conduct and the allegedly retaliatory actions he suffered. Section 3730 (h) "provides relief only if the whistle blower can show by a preponderance of the evidence that the employer's retaliatoryactions resulted because of the whistle blower's participation in a protected activity." See e.q.,Turnes v. AmSouth Bank. N.A., 36 F.3d 1057, (11th Circ., 1994) ; Hopper v. Anton, 91 F.3d 1261 (9th Cir. 1996), $. Rep. 99-345, at 34, reprinted in 1986 U.S.C.C.A.N. at 5299. A plaintiff seeking recovery under § 3730 (h) , as under other Federal whistle blower statutes, "must show that retaliation was motivated, at least in part, by the employee's engaging in protected activity. Id. Once that showing has been made, the burden of proof s h i f t s to the employer to prove affirmatively that the same decision would have been made even if the employee had not engaged in protected activity. Thus, to survive summary judgment, Dr. Rodriguez must establish the existence of a genuine issue of fact as to whether the assertedly negative 'treatment be suffered was motivated a t least in part by retaliation for his protected conduct. He has not done so.

To prove a causal connection, a plaintiff may either present direct evidence of retaliatory intent or raise, by indirect evidence, an inference of r e t a l i a t i o n . See Turnes v. AmSouth Bank, NA, 36 F.3d 1057, 1060-1061 (11th Cir. 1994); Howard v. BP Oil Co., Inc., 32 F.3d 520, 524 (11th C i r. 1994). "Direct evidence is evidence that establishes the existence of [retaliatory] intent behind the employment decision without any inference or presumption." Standard v . A.B .E..L. Servs., Inc. 161 F. 3d 1318, 1330 (11th Cir. 1998) (citations omitted). Dr. Rodriguez has presented no direct evidence of retaliatory intent.

When a plaintiff seeks to prove his case with indirect evidence, as Dr. Rodriguez does here, the plaintiff has the i n i t i a l burden of establishing a prima-facie case. To prove a prima-facie case of retaliation. courts require that the plaintiff prove that (1) the employer is covered by the act at issue, (2) the employee engaged in protected a c t i v i t y , (3) the employee suffered adverse action, and (4) there is an iinference of causation between the protected activity and the adverse action. See Bechtel Const. Co. v. Secretary of Labor, 50 F.3d 926, 934 (11th Cir. 1995) (case under whistle blower-protection provision of Energy Reorganization Act of 1974, § 210(a), as amended, 42 U-S-C.A. § 5851(a)). The showing necessary to demonstrate the causal-link part of the prima facie case is not onerous; the plaintiff merely has to prove that the protected activity and the negative employment action are not completely unrelated." Holifield v. Reno, 115 F.3d 1555, 1566 (11th Ci r . 1997). "To do so, [t l h e plaintiff must at least establish t h a t the employer was actually aware of the protected expression at the time t h e employer took adverse employment action against the plaintiff. Id.

If established, the prima-facie case raises a presumption that the employer is liable to the employee. See Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Under this approach, known as the McDonnell. Douglas approach, the burden then shifts t o the employer to rebut the presumption by producing sufficient evidence to raise a genuine issue o f fact as to whether the employer took unlawful actions against the employee. The employer can meet this burden of production by articulating a legitimate, nonretaliatory reason for the employment decision, a reason which is clear, reasonably specific, and worthy of credence. The rebuttal burden is one of production only, and the employer does not have to persuade the court that it was actually motivated by the proffered reason. See Burdine, 450 U.S. a t 253-55, 101 S.Ct. at 1093-94. Once the employer satisfies this burden of production, the focus shifts to the employee's ultimate burden of proving by a preponderance of the evidence t.hat the employer's proffered reason for its employment decision is a pretext for retaliation. The employee may meet this burden by persuading the factfinder either directly that a retaliatory reason more than l i k e l y motivated the employer or indirectly that the proffered reason for the employment decision is not worthy o f b e l i e f.

Dr. Rodriguez has presented a prima-facie case of retaliation and has therefore created a presumption of Holy Cross' liability. It is undisputed that Holy Cross is subject to the FCA. As discussed earlier, Dr. Rodriguez engaged in conduct protected under § 3730 (h) of which the defendants were aware, and he was transferred to another medical practice and eventually his employment was terminated.

Defendant Holy Cross has also met its burden of production by articulating a number of legitimate non-retaliatory reasons for Dr. Rodriguez's transfer to another medical group and the subsequent termination of his Employment Agreement. First, Holy Cross contends that no malice resulted from Dr. Rodriguez's 1995 letter. In fact, after learning of Plaintiff's billing concerns, Holy Cross contends that it took a number of positive steps to have an ongoing working relationship with Plaintiff. Defendant contends that the Director of Physician Relations, Mark Dissette, developed a "good personal relationship" with Pr . Rodriguez, Defendant contends further that Mr. Comrie also undertook to develop a good rapport with P l a i n t i f f after January 1'995. In fact, according to Defendant, Mr. Cornrie and Plaintiff became "hunting buddies." Additionally, according to Holy Cross, it appointed Plaintiff to be liaison physician to a second adult living facility, so as to "continue to create favorable exposure for him, enhance his stature, and help him increase his billings." Secondly, Holy Cross points to Dr. Rodriguez's low productivity and patient level. as a legitimate reason far his transfer to t h e Pompano Clinic. According to Defendant, since the inception of his employment w i t h Holy Cross, Dr. Rodriguez was in continuous discussions with Mr. Dissette and Mr. Comrie regarding ways he could increase his low patient and productivity levels. In August 1995 Dr. Rodriguez met with Mr. Dissette far his performance evaluation and received good ratings in a l l categories but "physician productivity" which was below the targeted threshold. Holy Cross contends t h a t it transferred Plaintiff to the newly acquired Pompano Clinic to increase his productivity and fill the need for a new full-time physician. In fact, Defendant contends that once at the Pompano Clinic, P l a i n t i f f did become more productive, and for the first time in two years of employment, actually earned incentive compensation.

Additionally, many of the Pompano Clinic patients were French Canadian and the added fact that Dr, Rodriguez is conversational in French also factored into the transfer decision. Plaintiff presents no evidence that contradicts defendants' statements regarding his low levels of patient productivity. Nor does he deny his friendly relationships with Mr. Comrie and Mr. Dissette. Moreover, Defendant does not deny his language skills and his ability to communicate well with the French Canadian patients at the Pompano Clinic. As such, Plaintiff has failed to prove by a preponderance of the evidence that the transfer was a pretext for retaliation.

After Dr. Rodriguez's transfer to the Pompano Clinic, an incident occurred whereby a patient was left untreated in the waiting room for an extended period of time. According to Defendant, Mrs. Rodriguez (no relation to Plaintiff) was "abandoned" in the examining room at Pompano Clinic where she was suffering from severe ear pain, while Plaintiff went to lunch. According to Holy Cross, Mrs. Rodriguez blames Plaintiff, who in turn contends that he was unaware of Mrs. Rodriguez's presence at the clinic and blames the mix-up on Pompano Clinic's poor management. Defendant contends that subsequently, a "downward spiral developed" between Plaintiff and Holy Cross management.

According to Defendant, during a January 1996 meeting between Dr. Rodriguez and Mr. Dissette, Mr. Dissette expressed Holy Cross' continued concern about Rodriguez's productivity and suggested he stay later in the day to clear the patients in the day to clear the patients in the busy office. According to Defendant, Dr. Rodriguez responded that he was not willing to work more than his required forty (40) hours per week. Plaintiff does not contradict

Defendant's statements regarding his lack of productivity, his refusal to work additional hours, or the occurrence of the of acrimonious meeting that occurred with Mr Dissette.

According to Defendant, during a very heated meeting with Mr. Comrie t h a t occurred i n January or February 1996, Dr. Rodriguez again expressed his extreme unhappiness with the Pompano Clinic. According to Defendant, during the meeting Dr. Rodriguez made a number of extremely critical statements (none related to billing issues) about the management of the Pompano Clinic and suggested another move to another location, Defendant contends that based upon the meeting, Mr. Comrie believed Dr. Rodriguez was extremely unhappy with Holy Cross and that a "healthy, productive working relationship" did not exist between the two. Subsequently, Mr. Comrie met with Holy Cross management, including Holy Cross CEO and CFO, t o discuss Dr. Rodriguez. The management team's concensus was t h a t "terminating the employment agreement was in the best of everyone concerned." Given the outcome of the meetings that occurred between Dr. Rodriguez and Holy Cross management, Dr.Rodriguez's extreme unhappiness with the Pompano Clinic and Holy Cross management practices, the issues with h i s productivity and his unwillingness to work additional hours, Holy Cross' decision is not one that seems illegitimate.

Plaintiff has failed to present any evidence rebutting what Holy Cross purports to be the legitimate, non-retaliatory reasons f o r his transfer to the Pompano Clinic and its subsequent termination of the Employment Agreement. Theref ore, Plaintiff has failed to prove by a preponderance of the evidence that his transfer and Holy Cross' subsequent termination of the Employment Agreement was a method of

retaliation or that Defendant's reasons for the transfer and termination were a pretext for retaliation.

Accordingly, P l a i n t i f f has failed to allege any issues of material fact upon which the Court could deny Defendants motion for summary judgment as it pertains to Plaintiff's federal claim.

Breach of Contract State Claim

According to the Complaint, pursuant to h i s contract with Holy Cross, Dr. Rodriguez was entitled to Incentive Compensation in accordance with Section 3B and Exhibit E of the Employment Agreement as well as Deferred Compensation in accordance with Section 3C of the E m p l oyment Agreement. According to the Complaint, based upon on oral aqreernent between Plaintiff and Dan Comrie, Dr. Rodriguez was also entitled to compensation for Paid Time Off earned but not taken.

A district court has discretion to decline to exercise supplemental jurisdiction over state law claims when: 1) the claim raises a novel or complex issue of State 1aw; 2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction: 3) the district court has dismissed all claims over which it has original jurisdiction; or 4)in exceptional circumstances, there are other compelling reasons for declining jurisdiction. 28 U.S.C. P 136 (c); Rowe v. Fort Lauderdale, 279 F.3d 1271 (11th C i r . 2002) . The Court may decline to exercise jurisdiction over state-law claims, where the Court has dismissed a l l the federal claims over which it has original jurisdiction. See 28 U.S.C. 1367 (c) (3). Having dismissed Plaintiff's federal claim, the Court declines in its discretion

to exercise supplemental jurisdiction over the remaining state-law claim.

CONCLUSION

Based upon t h e foregoing, it is
ORDERED AND ADJUDGED that Defendant's Motion for Final Summary Judgment is GRANTED as to Count I, It is further
ORDERED AND ADJUDGED that the remaining state-law claim is hereby REMANDED to the Eleventh Judicial Circuit in and for Miami-Dade, County. It is further
ORDERED AND ADJUDGED t h a t this case is CLOSED for administrative purposes and all pending motions are DENIED as moot.
DONE AND ORDERED in Chambers at Miami, Florida, this 23rd day of April, 2003.

Donald L. Graham
UNITED STATES DISTRICT JUDGE

cc : Counsel of Record

APPENDIX C

Appellate Rehearing Denial

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 03-13551-CC

JOSEPH RODRIGUEZ M.D.,
Plaintiff-Appellant
Cross-Appellee,

Versus

HOLY CROSS HOSPITAL, INC.,
d.b.a. Holy Cross Medical Group,
HOLY CROSS HOSPITAL,
Defendants-Appellees
Cross-Appellants.

NO. 03-13851-CC

UNITED STATES OF AMERICA,
ex rel.,Plaintiff,
JOSEPH A. RODRIGUEZ, M.D.,
Plaintiff-Appellee,

versus

HOLY CROSS HOSPITAL, INC.,
a Florida Corporation,
d.b.a. Holy Cross Medical,
d.b.a. Holy Cross Hospital,
HOLY CROSS HOSPITAL,
Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of Florida

BEFORE :

Judges: HULL and MARCUS, Circuit Judges, and MILLS*, District Judge

PER CURIAM:

The petition(s) for rehearing filed by Appellant is DENIED.

ENTERED FOR THE COURT:

*Honorable Richard H. Mills, United States District Judge for the Central District of Illinois, sitting by designation.

APPENDIX D

District Court Affirmation

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
Case No.03-60070-CIV-GRAHAM

JOSEPH A, RODRIGUEZ, M.D.
Plaintiff,

vs.

HOLY CROSS HOSPITAL, INC., a Florida corporation b/d/a HOLY CROSS MEDICAL GROUP and HOLY CROSS HOSPITAL,
Defendant.

ORDER

THIS CAUSE came before the Court upon Defendant's Motion for Relief from Order pursuant to Rule 60 of the Federal Rules of
Civil Procedure. (D.E. 107) .

THE COURT has considered the motion, the pertinent portions of the record, and is otherwise fully advised in the premises.

I. BACKGROUND

T h i s action arose out of an employment dispute between Plaintiff Joseph A. Rodriguez, M.D. ("Dr. Rodriguez") and his former employer, Holy Cross Hospital, Inc., a Florida corporation d/b/a Holy Cmss Medical Group (the "Medical Group") and Holy Cross Hospital (collectively "Holy Cross") . The Complaint asserted a federal claim for retaliation

under 31 U.S.C. §3730(h) of the False Claims Act (VCA"), maintaining that Holy Cross fired Dr. Rodriguez for bringing to Holy Cross's attention alleged improper billing activities (the"Protected Activity").Additionally the Complaint asserted a pendent state law claim for breach of contract related to Holy Cross's alleged failure to make 1) incentive compensation, 2) deferred compensation and 3) paid time off payments to Dr. Rodriguez.

On April 23, 2003, the Court granted Defendants' Motion for Final Summary Judgment, holding that Plaintiff had failed to prove by a preponderance of the evidence that his transfer and
subsequent termination were a method of retaliation, or that Defendants' reasons for the transfer and termination were a pretext for retaliation. The Court also dismissed the state law
claim for breach of contract pursuant to 28 U.S.C. §I367 (c) (3).

Plaintiff now moves the Court to reconsider its prior ruling, arguing that evidence concerning Dr. Rodriguez's alleged retaliatory termination was not available for the Court's proper determination when it considered Defendants' Motion for Summary Judgment. In particular, Plaintiff argues that Bob Comrie' s ('Comrie") second deposition substantiates the claim that Dr. Rodriguez's termination was, in part, retaliation for his activities that were protected under the FCA.

II. DISCUSSION

A. standard of Review - Motion for Reconsideration

There are generally three grounds upon which reconsideration of an order is appropriate: (1) an intervening change in controlling law; (2) the availability of new evidence; and (3) the need to correct error or manifest injustice. Mullin V. Dzikowski, 257 B.R. 356, 363 (S.D. Fla. 2000). Plaintiff asserts that testimony from Comrie's second deposition strengthens the alleged causal connection between Plaintiff's protected activity and Defendants adverse employment action taken against Dr. Rodriguez. Dr. Rodriguez argues that the deposition was not available to the Court for consideration when it granted Defendants' Motion for Summary Judgment, and should therefore be considered newly discovered evidence.

B. Rule 60 (b) (2) - Newly Discovered Evidence.

In order to obtain relief from a final judgment based upon the availability of new evidence, a movant bears the burden of proving five elements: (1) the evidence must be newly discovered since the trial; (2) due diligence on the part of the movant to discover the new evidence must be shown; (3) the evidence must not be merely cumulative or impeaching; (4) the evidence must be material; and (5) the evidence must be such that a new trial would probably produce a new result. Waddel v. Henderson, 16 Fla. L. Weekly Fed. C 595 01th Cir. 2003) (citing, Toole v. Baxter Healthcare Corp., 235 F.3d 1307, 1316 (11th Cir. 2000)). "A motion for a new trial under Rule 60(b) (2) is an extraordinary motion and the requirements of the rule must be strictly met. "Toole, 235 F.3d at 1316 (quoting, Scutieri v. Page, 808 F.2d 785,793 (11th Cir. 1984)).

Plaintiff contends that during his second deposition, Comrie expressed that Dr. Rodriguez was terminated, in part,

because of the Protected Ac-Livity. Plaintiff argues that this "new" testimony has substantially buttressed and strengthens prior assertions made during previous testimony. However, in both depositions, Comrie clearly states that Dr. Rodriguez's termination was the culmination of many events that occurred during his employment. The Court can see no significant distinction between the testimony offered from Comrie' s first deposition and that offered from his second.

It appearing that Plaintiff has failed to satisfy the first element of the newly discovered evidence test, Plaintiff's motion must be denied.

III. CONCLUSION

Based on the foregoing, it is,
ORDERED AND ADJUDGED that Plaintiff's Motion for Relief From Order is DENIED. (D.E. 107). It is further,
ORDERED AND ADJUDGED that this case remains CLOSED for administrative purposes. It is further
ORDERED AND ADJUDGED the Plaintiff's remaining state law claim remains DISMISSED.
DONE AND ORDERED in Chambers at Miami, Florida, this 17th day of June, 2003.

DONALD L. GRAHAM
UNITED STATES DISTRICT JUDGE
cc: Counsel of record

Supreme Court, U.S.
FILED
AUG 23 2005
OFFICE OF THE CLERK

No. 05-154

IN THE

Supreme Court of the United States

JOSEPH A. RODRIGUEZ, M.D.,
Petitioner,

v.

HOLY CROSS HOSPITAL, INC.,
Respondent.

On Petition for Extraordinary Writ of Mandamus to the Eleventh Circuit Court of Appeals

OPPOSITION BRIEF TO PETITION FOR WRIT OF MANDAMUS

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QUESTIONS FOR REVIEW

1. Does this court have jurisdiction to issue an extraordinary writ under Sup. Ct. R. 20 and 28 U.S.C. § 1651?
2. If treated as a writ of certiorari under Sup. Ct. R. 12, was Rodriguez' petition filed timely?
3. Does the Supreme Court have jurisdiction to review the decision of the Eleventh Circuit Court of Appeals as none of the issues raised in Rodriguez' petition were properly and timely addressed to either the District Court or the Eleventh Circuit Court of Appeals?
4. If Rodriguez' petition is treated as a petition for writ of certiorari, are there compelling reasons for granting the writ or does the petition merely assert erroneous factual findings or the misapplication of a properly stated rule of law?

CERTIFICATE OF INTERESTED PERSONS AND PUBLIC DISCLOSURE STATEMENT

- The Honorable Barry L. Garber—
  United States District Court Magistrate Judge
- The Honorable Donald L, Graham—
  United States District Court Judge
- Catholic Health East
- Holy Cross Health Ministries, Inc.
- Holy Cross Hospital, Inc., a Florida corporation
  d/b/a Holy Cross Medical Group—Respondent
- Broad and Cassel—Law firm for Respondent
  Steven Ellison, Esq.
- Steven Parrish, Esq.—Counsel for Respondent
- Andrew D. Rafkin, Esq.—Counsel for Respondent
- Joseph A. Rodriguez, M.D.—Petitioner

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IN THE

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On Petition for Extraordinary Writ of Mandamus to the Eleventh Circuit Court of Appeals

OPPOSITION BRIEF TO PETITION FOR WRIT OF MANDAMUS

JURISDICTIONAL STATEMENT

This court lacks jurisdiction because Rodriguez' petition fails to demonstrate entitlement to the issuance of an extraordinary writ under Sup. Ct. R. 20 or 28 U.S.C. § 1651. Specifically, the petition does not demonstrate that the issuance of an extraordinary writ will aid the Court in the exercise of its appellate jurisdiction or that exceptional circumstances warrant the exercise of the Court's discretionary powers. Rodriguez' petition simply seeks appellate review and is in substance a petition for a writ of certiorari.

As such, this Court lacks jurisdiction to review Rodriguez' petition because the petition was filed more than 90 days after the Eleventh Circuit Court of Appeals denied Rodriguez' motion for a rehearing. Specifically, the opinion of the

Eleventh Circuit Court of Appeals was rendered on October 22, 2004. (Rodriguez App-A) Rodriguez' motion for a rehearing was denied on December 6, 2004. (HC App-A)[1] As this petition was filed on March 14, 2005, more than 90 days after the Court of Appeals entered its order denying Rodriguez' motion for a rehearing, Rodriguez' petition is untimely even if treated as a petition for a writ of certiorari.

CONSTITUTIONAL PROVISIONS, TREATISES, STATUTES

None

STATEMENT OF THE CASE

On or about November 24, 1999, the Petitioner, Joseph A. Rodriguez, M.D. ("Rodriguez") filed under seal two qui tam claims brought under the False Claims Act. Rodriguez' complaint alleged that Holy Cross Hospital, Inc. ("Holy Cross") fraudulently billed Medicare and further asserted employment related claims for whistle blower retaliation under 31 U.S.C. § 3730(h) of the False Claims Act. The complaint also contained pendent state law claims alleging breach of contract and a right to incentive compensation related to Rodriguez' written Employment Agreement with Holy Cross.[2]

After the conclusion of discovery, on February 18, 2003, Holy Cross filed its Motion for Summary Judgment. Holy Cross' Motion for Summary Judgment demonstrated that Rodriguez was not engaged in protected activity, and even if he were, Holy Cross had legitimate, non-retaliatory reasons for first transferring Rodriguez and then later terminating

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[1] References to Rodriguez' Appendix to his Petition are designated (Rodriguez App-__). References to Holy Cross' Appendix to this opposition brief are designated as (HC App-__).

[2] The underlying facts of the case as to which there was no genuine issue are found in the opinion of the District Court and of the Court of Appeals (Rodriguez App-A and B).

him. On March 4, 2003, Rodriguez filed a motion for a continuance of the summary judgment proceedings arguing that Holy Cross had failed to produce outstanding discovery pursuant to a court order. On March 10, 2003, Rodriguez filed a similar motion for sanctions asserting that Holy Cross either failed to produce requested discovery documents or wrongfully destroyed the documents that were the subject of Rodriguez' request for production. On April 6, 2003, the District Court denied Rodriguez' motion for a continuance.

On April 14, 2003, the parties traveled to Dallas, Texas to take the deposition for use at trial of the former Vice President of Physician Services at Holy Cross, Dan Comrie ("Comrie").[3] On April 28, 2003, the District Court granted Holy Cross' Motion for Summary Judgment finding that Rodriguez had failed to demonstrate any causal connection between the claimed protected conduct and the alleged retaliatory actions. As to Rodriguez' March 10, 2003 Motion for Sanctions relating to alleged spoliation of evidence, the District Court's Order on Summary Judgment adjudicated that Rodriguez's motions related to discovery were moot. (Rodriguez App-B).

Based on what Rodriguez characterized as newly discovered evidence gleaned from a small excerpt of the April 14, 2003 deposition of Comrie, five days after the court entered summary judgment in favor of Holy Cross, on April 28, 2003, Rodriguez filed a Motion for Reconsideration or Relief from the Court's April 23, 2003 Summary Judgment. Notwithstanding that at the time Rodriguez filed his Motion for Reconsideration, the District Court had denied his motion for a continuance and had deemed moot Rodriguez' Motion for Sanctions, Rodriguez' motion for a rehearing did not raise either issue as a basis for the court to reconsider its ruling. Instead, Rodriguez limited his motion to arguing that

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[3] Connie had previously been deposed for discovery purposes.

the deposition of Comrie provided direct evidence of retaliation obviating Rodriguez' legal obligation to rebut Holy Cross' legitimate articulated reasons for terminating him. On June 17, 2003, the District Court denied Rodriguez' Motion for Relief from Final Judgment and Motion for Reconsideration. (Rodriguez App-D).

On July 10, 2003, Rodriguez filed a Notice of Appeal to the Eleventh Circuit Court of Appeals. Rodriguez' Initial Brief filed on November 15, 2003 raised only two issues: i) Did the District Court err in granting summary judgment in favor of Holy Cross by determining as a matter of law that Rodriguez failed to establish the causal link between his protected activity and adverse employment actions taken against him by Holy Cross; and ii) Did the District Court abuse its discretion when it denied Rodriguez' Motion for Relief from Summary Judgment by concluding that the deposition testimony of Dan Comrie at his second deposition did not add anything significant to the testimony he gave at his first deposition. (HC App-B) Rodriguez' Initial Brief did not address to the Eleventh Circuit Court of Appeals even one issue presented to this Court in his Petition for Extraordinary Writ.

However, after Holy Cross filed its Answer Brief, Rodriguez, on January 29, 2004, in his Reply Brief, attempted to expand the scope of his appeal. Specifically, in his Reply Brief, Rodriguez, for the first time, raised the question of whether he was afforded a full and fair opportunity to demonstrate Holy Cross' retaliatory intent because Holy Cross allegedly failed to produce or improperly destroyed critical documents. Rodriguez' Reply Brief in passing also mentioned that the District Court had failed to grant his motion for a continuance of the summary judgment proceedings even though the requested discovery had not been produced. (HC App-C) As Rodriguez failed to timely raise in his Initial Brief either the issue of the District Court's failure

to continue the summary judgment hearing or the implications of Rodriguez' spoliation of evidence claim, on February 10, 2004, Holy Cross filed a Motion to Strike from Rodriguez' Reply Brief these previously unasserted arguments. (HC App-D) On March 3, 2004, the Court of Appeals entered an order striking from Rodriguez' Reply Brief those arguments which challenged the denial of Rodriguez' motion for a continuance and challenged the District Court's failure to draw an inference in favor of Rodriguez consequent to Holy Cross' alleged failure to produce certain discovery. (HC App-E)

On October 22, 2004, the Court of Appeals rendered a decision upholding the District Court's judgment granting summary judgment in favor of Holy Cross. (Rodriguez App-A) On November 10, 2004, Rodriguez filed a Motion for Reconsideration or Rehearing in the Court of Appeals, again raising the District Court's failure to rule favorably on his pending Motion for Sanctions and again challenging Holy Cross's alleged failure to produce discovery prior to the time the District Court entered summary judgment in favor of Holy Cross. On December 6, 2004, the Court of Appeals denied Rodriguez' motion for a rehearing. (HC App-A).

On March 14, 2005, more than 90 days after the Court of Appeals denied Rodriguez' motion for a rehearing, Rodriguez filed with the Supreme Court of the United States a petition for relief styled as a Petition for an Extraordinary Writ. The petition did not seek a writ of mandamus, prohibition or habeas corpus or in any way evidence that the issuance of a writ would be in aid of this Court's appellate jurisdiction. To the contrary, Rodriguez' petition in substance was nothing other than an untimely petition for a writ of certiorari seeking review of the decision of the Eleventh Circuit Court of Appeals.

On or about March 22, 2005, the Clerk of the Court of the United States Supreme Court rejected Rodriguez' petition as

a result of its failure to comply with Rules of the Supreme Court. The Clerk instructed Rodriguez to file a corrected petition within 60 days. Accordingly, on or about May 20, 2005, Rodriguez filed a revised petition entitled Petition For An Extraordinary Writ of Mandamus. However, as Rodriguez' petition still violated Rules of the Supreme Court, on May 31, 2005, the Clerk of the Court again declined to docket Rodriguez' petition and ordered Rodriguez to re-file within 60 days. On July 28, 2005, Rodriguez filed his second revised petition which was docketed by the Clerk of the Court on or about August 1, 2005.

SUMMARY OF THE ARGUMENT

Rodriguez' petition seeking a writ of mandamus is in substance nothing more than a petition for a writ of certiorari. This Court lacks jurisdiction to entertain Rodriguez' petition for a writ of certiorari as it was filed untimely pursuant to Sup. Ct. R. 13.3. Rodriguez' attempts to circumvent the effect of his untimely filing by characterizing his petition as a petition for an extraordinary writ cannot confer jurisdiction. Rodriguez' petition fails to establish any of the three criteria necessary to invoke this Court's jurisdiction under 28 U.S.C. § 1651(a).

In any event, this Court cannot consider the arguments raised in Rodriguez' petition because those issues were not raised or resolved in the lower courts. In fact, Rodriguez waived his right to seek appellate review of each issue presented for review in his petition.

Further, Rodriguez' petition fails to raise any arguments that hurdle the court's jurisdictional threshold for granting a writ of certiorari. Other than disagreeing with the holdings of both the District Court and the Eleventh Circuit Court of Appeals, Rodriguez' petition does not assert any conflict between the Circuit Courts of Appeal, a federal question that conflicts with a decision of the Florida Supreme Court or the

departure from the accepted usual course of judicial proceedings. In fact, it is the lower courts' adherence to the accepted and usual course of judicial proceedings that has brought Rodriguez to his current posture.

Last, as this Court's recent decision in *Graham County Soil & Conservation District v. U S. ex rel. Wilson*, 125 S. Ct. 2444; 162 L. Ed. 2d 390 (2005) upholds the position asserted by Holy Cross both in the District Court and the Court of Appeals that Rodriguez' retaliation claim is time barred, it would be a waste of judicial resources to reverse the summary judgment entered in favor of Holy Cross only to have Rodriguez' claims again denied on statute of limitations grounds.

ARGUMENT

I. THIS COURT LACKS JURISDICTION BECAUSE RODRIGUEZ' PETITION WAS NOT TIMELY FILED

Sup. Ct. R. 13.3 provides, "the time to file a petition for a writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed. . . But if a petition for rehearing is timely filed in the lower court by any party, the time to file the petition for a writ of certiorari for all parties . . . runs from the date of the denial of the petition for rehearing. The Eleventh Circuit Court of Appeals denied Rodriguez' motion for a rehearing on December 6, 2004. (HC App-A) (See also, page 2 of Rodriguez' petition.) Accordingly, Rodriguez' time to file a petition for writ of certiorari expired on March 6, 2005. As Rodriguez did not file his petition seeking a writ until March 14, 2005, Rodriguez failed to timely invoke the jurisdiction of this Court. Rodriguez' petition must therefore be dismissed for lack of jurisdiction.

Rodriguez attempts to circumvent the effect of his untimely filing by characterizing his petition as a petition for an extraordinary writ under Sup. Ct. R. 20 and 28 U.S.C.

§ 1651(a). However, Rodriguez cannot avoid the consequences of his failure to timely file a petition for a writ of certiorari by simply labeling a petition for writ of certiorari as a petition for an extraordinary writ of mandamus. Sup. Ct. R. 20 provides that to justify the granting of an extraordinary writ, "the petition must show that the writ will be in aid of the court's appellate jurisdiction, that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court".

Rodriguez' petition fails to establish any of the three criteria necessary to invoke the court's jurisdiction under 28 U.S.C. § 1651(a). First, Rodriguez' petition simply seeks review of the decision of the Eleventh Circuit Court of Appeals. Rodriguez does not request the issuance of a writ of mandamus, writ of prohibition, or writ of habeas corpus in order to aid the court in its exercise of certiorari jurisdiction. Second, other than disagreeing with the decision of the Eleventh Circuit Court of Appeals, Rodriguez cites no exceptional circumstances that would warrant the exercise of this court's discretionary powers. Rodriguez' position is not unique from any other party who failed to prevail in the lower courts. Last, a petition for a writ of certiorari timely filed would have provided alternative adequate relief to Rodriguez. Rodriguez' failure to timely file a petition for a writ of certiorari cannot constitute either the exceptional circumstances necessary to invoke the Court's extraordinary writ jurisdiction or satisfy the criterion that adequate relief is not available in any other court.

In any event, as this Court recently decided that retaliation claims under 31 U.S.C. § 3730(h) must be filed prior to the expiration of the limitations period under the most closely analogous state law, Rodriguez' claim is time barred. *Graham County Soil & Conservation District v. US. ex rel, Wilson*, 125 S. Ct. 2444; 162 L. Ed. 2d 390 (2005). On February 19,

1996, Rodriguez was provided six months written notice terminating his employment, but did not file his retaliation complaint until November 23, 1999 (Rodriguez App-A, pg. 38). Under Fla. Stat. § 448.103, the state statute mostly closely analogous to 31 U.S.C. § 3730(h), the statute of limitations expired in 1998, two years after Rodriguez' termination.[4] Accordingly, it would be a waste of scarce judicial resources to entertain Rodriguez' petition founded on a stale time barred claim.

II. RODRIGUEZ' PETITION SEEKS REVIEW OF ISSUES NOT DECIDED BY THE COURT OF APPEALS

The Supreme Court will not consider arguments raised for the first time in a brief when those issues were not raised or resolved in the lower courts absent unusual circumstances. *NCAA v. Smith*, 525 U.S. 459, 119 S. Ct. 924, 930 (1999); *Taylor v Freeland and Kronz*, 503 U.S. 6.38, 645-646, 112 S. Ct. 1644 (1992). Yet, Rodriguez' petition seeks review of five issues, none of which was presented to the Court of Appeals or to the District Court.

At the District Court, Rodriguez waived the argument that the court erred in granting summary judgment while Rodriguez' motion for discovery sanctions remained pending because Rodriguez never raised the issue in his motion for rehearing. Similarly, Rodriguez waived this issue at the Court of Appeals. While Rodriguez did make a belated effort in his Reply Brief filed in the Court of Appeals to argue that the District Court improperly granted summary judgment while discovery and his Motion for Sanctions were pending, the Court of Appeals struck those arguments from Rodriguez'

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[4] The Court of Appeals declined to address this issue raised by Holy Cross in its Cross-Appeal because the judgment was affirmed on other grounds. (Rodriguez App-A, pg. 44, 56).

Reply Brief because Rodriguez had waived those issues by failing to raise them in his Initial Brief (HC App-E). Due to the Court of Appeals striking from Rodriguez' Reply Brief the arguments relating to outstanding discovery and sanctions, these issues were never presented to or considered by the Court of Appeals and therefore, this Court cannot review any of these issues here for the first time. In any event, the arguments raised by Rodriguez with respect to alleged spoliation of evidence and in support of his petition contain significant misstatements of fact and law.

A. Spoliation of Evidence

On February 19, 1996, Rodriguez was provided six months written notice terminating his employment effective August 19, 1996 (Rodriguez App-A, pg, 38). More than three years after his termination, on November 23, 1999, Rodriguez filed his initial complaint alleging two qui tam claims under the False Claims Act, retaliatory discharge under 31 U.S.C. § 3730(h) and breach of his employment contract. On December 7, 2001, the United States of America intervened in the action for the sole purpose of joining with Rodriguez in stipulating to the dismissal with prejudice of the qui tam claims contained in Counts I and II of the Complaint. As Rodriguez' Complaint remained under seal until shortly before the United States of America intervened, Holy Cross had no knowledge of the pendency of the action against it claiming retaliation nor knowledge of Rodriguez' pendent state law claims until the later half of 2001.

The following year, in June 2002, Rodriguez filed his first request for production of documents. (HC App-F) The documents Rodriguez sought were relevant to Rodriguez' state law claim seeking incentive compensation. Specifically, paragraph No. 9 requested "all billing records for the practices in which Joseph A. Rodriguez, M.D. was employed during the specific time of his employment", and paragraph

No. 20 sought "all records including, but not limited to patient records supporting the determinations of incentive compensation owed to and paid to Plaintiff". (HC App-F).

On February 3, 2003, the District Court's Magistrate Judge overruled Holy Cross' objection to Rodriguez' request to produce and ordered Holy Cross to respond. Holy Cross appealed the Magistrate's ruling, but on March 3, 2003, the District Court Judge affirmed the Magistrate's order compelling discovery. However, by this time in March 2003, many of the requested documents could not be located, or had been routinely discarded prior to Holy Cross having notice of Rodriguez' claims in this case.

Specifically, subsequent to Rodriguez' termination, Holy Cross reviewed Rodriguez' entitlement to incentive compensation. In connection with that inquiry, Holy Cross retained in 1996 and 1997 the independent accounting firm of Adair & Fuller. In 1997, after reviewing certain voluminous billing documents related to Rodriguez' practice during 1996, Adair & Fuller prepared a written report which found that Rodriguez had actually been overpaid his incentive compensation. Holy Cross immediately forwarded the Adair & Fuller report to Rodriguez. Holy Cross had provided Adair & Fuller with a "green bar" computer spreadsheet printout related to Rodriguez' billings and Adair & Fuller did copy a small number of other billing documents. However, the vast majority of the documents related to its inquiry were not copied. Two years later, in 1999, much of the data related to the "green bar" computer spreadsheet was lost during efforts by Holy Cross to correct problems related to data storage in its computer system. Then, in the first half of 2001, having heard nothing further on its Rodriguez assignment for four years, Adair & Fuller, without notice to or any involvement by Holy Cross, discarded its copy of the "green bar" computer spreadsheet printout pursuant to its own internal four year document retention policy. The related internal

billing documents, known as "Superbills", sought by Rodriguez were routinely discarded by Holy Cross both during and after Rodriguez' employment, as these documents were not patient records or billing records sent to third party payors such as Medicare or health insurance companies.

Very importantly, Holy Cross had no statutory or other legal obligation to retain these records, especially as Holy Cross did not know of the pendency of Rodriguez' action at the time the records were discarded. First, 42 CFR 489.20(f) is only applicable to providers such as hospitals and skilled nursing care workers, not to physicians employed by hospitals such as Rodriguez. Additionally, even if this regulation were applicable to physicians, 42 CFR 489.20 only requires the retention of certain medical records, not billing records, and further mandates no specific record retention requirement of any length. Likewise, CMS Rule 556 cited by Rodriguez on page 9 of his petition does not apply to physician services. CMS Rule 556 is a section of an internal manual prepared by Medicare which applies to hospitals and skilled nursing facilities and moreover, as an internal interpretation of instructions for making Medicare claims, the "Rule" does not have the force or effect of law. As parties have no duty to preserve potential evidence absent a contract, a statute or absent receiving a properly served discovery request after a lawsuit has been filed, *Royal & Sunalliance v. Lauderdale Marine Center*, 877 So. 2d 843 (Fla. 4th DCA 2004), the CMS Rule cited by Rodriguez provides no basis to launch a spoliation claim. As Holy Cross had no statutory, regulatory or other legal obligation to preserve potential evidence at a time it did not even know of the pendency of Rodriguez' claims, Rodriguez' assertion that the summary judgment entered against him should be reversed as a result of the alleged spoliation of evidence is meritless.

Finally, as the billing records and discovery sought by Rodriguez were relevant to his state law claim for incentive

compensation and not defensive material to Holy Cross' Motion for Summary Judgment, even had Rodriguez timely raised these issues in the District Court and at the Court of Appeals, it would not have impacted the decision of either court.

B. Suicide of L. Perkins

Linda Perkins' suicide occurred on April 4, 2004, more than eight years after Rodriguez was terminated and almost one year after the District Court entered summary judgment against Rodriguez. The alleged implications of this tragic occurrence were not presented either to the District Court while the original appeal remained pending[5] or to the Court of Appeals, and Rodriguez' petition fails to demonstrate that Ms. Perkins' death was in any way relevant to the circumstances surrounding Rodriguez' termination or to the circumstances surrounding the discarding of Holy Cross' old records.

In fact, Ms. Perkins had been accused of embezzling almost $800,000 of funds from Holy Cross. After her embezzlement was detected by Holy Cross, her tragic demise ensued. Rodriguez' hypothesis that Ms. Perkins was "likely entrusted to handle the now spoliated evidence" is pure speculation.[6]

C. Disqualification

Rodriguez' last argues that this Court should accept jurisdiction because Broad and Cassel had a conflict of interest

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[5] Five months after the Court of Appeals denied Rodriguez' motion for a rehearing, on May 13, 2005, Rodriguez did file a second motion pursuant to Fed. R. Civ. P. 60 with the District Court, this time raising the L. Perkins conspiracy theory. On June 9, 2005, the District Court denied Rodriguez' motion. The order was not appealed.

[6] Equally conjectural is Rodriguez' uncorroborated, undocumented assertion that Broad and Cassel, which represents his current landlord, may have acquired access to his confidential papers relating to this dispute simply by virtue of the representation.

warranting its disqualification. Rodriguez had knowledge of the alleged circumstances giving rise to the disqualification argument as early as August 2001. In fact, as evidenced by the billing records of Rodriguez' attorney, Rodriguez specifically discussed with his attorney the possibility of moving to disqualify Broad and Cassel from representing Holy Cross during the District Court proceedings, but after conferring with counsel, Rodriguez affirmatively elected not to file the motion because Rodriguez' lawyer advised him the facts did not warrant disqualification, (HC App-G, See time entries for August 17 and 24, 2001). Having elected not to file a motion to disqualify Broad and Cassel in the District Court, Rodriguez thereby waived the right to seek any type of appellate review based on these grounds.

III. THE PETITION FAILS TO RAISE A VALID BASIS TO INVOKE CERTIORARI JURISDICTION

While Rodriguez' petition essentially raises arguments not addressed in the Court of Appeals, Rodriguez also suggests that the Court of Appeals misapplied the summary judgment rule, Fed. R. Civ. P. 56. However, Sup. Ct. R. 10 provides that, "a petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law".

Rodriguez' petition fails to raise any arguments that hurdle this Court's jurisdictional threshold. Specifically, Rodriguez does not argue that the Court of Appeals either (i) entered a decision in conflict with the decision of another United States Court of Appeals on some important matter; (ii) decided an important federal question in a way that conflicts with the decision by a state court of last resort; or (iii) so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court as to call for an exercise of this Court's supervisory power.

Throughout these proceedings, the District Court as well as the Eleventh Circuit Court of Appeals adhered to the established and accepted *McDonnell Douglas*[7] framework for adjudicating summary judgment motions in the employment context. Rodriguez' petition ignores the applicability of the *McDonnell Douglas* framework and cites Florida law which greatly differs from the federal standard for granting a motion for summary judgment. As Rodriguez' petition does not claim that the District Court or the Court of Appeals departed from the accepted and usual course of judicial proceedings in the application of the McDonnell Douglas framework to his case, but merely argues the misapplication of a properly stated rule of law, Rodriguez' petition fails to assert any basis for this Court to grant certiorari review under Sup. Ct. R. 10.

CONCLUSION

The Court should deny Rodriguez' petition seeking review in the United States Supreme Court.

Respectfully submitted,

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* Counsel of Record

Attorney for Respondent,
Holy Cross Hospital, Inc.

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[7] *See, McDonnell Douglas Corp v Green*, 411 U.S. 792, 93, S. Ct. 1817 (1973).

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Thomas K. Kahn
Clerk

December 06, 2004

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 03-13551-CC
Case Style: Joseph A. Rodriguez, M.D. v. Holy Cross Hosp.
District Court Number: 03-60070 CV-DLG

The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

Sincerely,

/s/ Thomas K. Kahn
THOMAS K. KAHN, Clerk

Reply To: Eleanor Dixon (404) 335-6172

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed Dec. 06, 2004]

No. 03-13551-CC

JOSEPH A. RODRIGUEZ, M.D.,
Plaintiff-Appellant
Cross-Appellee,

versus

HOLY CROSS HOSPITAL, INC., d.b.a. Holy Cross Medical Group, HOLY CROSS HOSPITAL,
Defendants-Appellees
Cross-Appellants.

No. 03-13851-CC

UNITED STATES OF AMERICA, *ex rel.*,
Plaintiff,

JOSEPH A. RODRIGUEZ, M.D.,
Plaintiff-Appellee,

versus

HOLY CROSS HOSPITAL, INC., a Florida Corporation, d.b.a. Holy Cross Medical, d.b.a. Holy Cross Hospital, HOLY CROSS HOSPITAL,
Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of Florida

BEFORE: HULL and MARCUS, *Circuit Judges*, and MILLS*, *District Judge*.

PER CURIAM:

The petition(s) for rehearing filed by Appellant is DENIED.

ENTERED FOR THE COURT:

/s/ [ILLEGIBLE]
UNITED STATES CIRCUIT JUDGE

* Honorable Richard H. Mills, United States District Judge for the Central District of Illinois, sitting by designation.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO.: 03-13551C

JOSEPH A. RODRIGUEZ,M.D.,
Plaintiff-Appellant - Cross-Appellee,

versus

HOLE CROSS HOSPITAL, INC. dlb/a HOLY CROSS MEDICAL GROUP, HOLY CROSS HOSPITAL,
Defendants-Appellees - Cross-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA
LOWER TRIBUNAL NO. 03-60070-CIV-GRAHAM

BRIEF OF PLAINTIFF/APPELLANT - CROSS/APPFLLEE,
JOSEPH A. RODRIGUEZ, M.D.

GARY E. SHERMAN of
LAW OFFICES OF GARY E. SHERMAN, P.A.
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STATEMENT OF THE ISSUES

I.

DID THE DISTRICT COURT ERR IN GRANTING SUMMARY JUDGMENT IN FAVOR OF HOLY CROSS BY DETERMINING, AS A MATTER OF LAW, THAT DR. RODRIGUEZ FAILED TO ESTABLISH THE CAUSAL-LINK BETWEEN HIS PROTECTED ACTIVITY AND ADVERSE EMPLOYMENT ACTIONS TAKEN AGAINST HIM BY HOLY CROSS?

II.

DID THE DISTRICT COURT ABUSE ITS DISCRETION WHEN IT DENIED DR. RODRIGUEZ' S MOTION FOR RELIEF FROM SUMMARY JUDGMENT BY CONCLUDING THAT THE TESTIMONY OF DAN COMRIE AT HIS SECOND DEPOSITION DID NOT ADD ANYTHING SIGNIFICANT TO THE TESTIMONY HE GAVE AT HIS FIRST DEPOSITION?

SUMMARY OF ARGUMENT

The district court correctly determined that Dr. Rodriguez established a prima facie case. Accordingly, the court ruled that Dr. Rodriguez was entitled to a rebuttable presumption that Holy Cross Hospital unlawfully retaliated against him for reporting fraud in the workplace. However, notwithstanding the evidence which supported Dr. Rodriguez's prima facie case, the district court erroneously held, as a matter of law, that Dr. Rodriguez failed to show by the preponderance of the evidence that Holy Cross Hospital's claimed reasons for taking adverse employment actions against him were pretextual. Evidently the district court concluded that the proximity in time of Defendant's actions to Dr. Rodriguez's protected activity and other evidence presented did not raise questions fact on the causal connection issue.

Plaintiff's evidence included testimony by Defendant's Hospital administrator, Dan Comrie, who stated that problems relating to the issues raised in Dr. Rodriguez's January 19, 1995 letter reporting fraud were a part of a series of events which culminated in his termination. In fact, in a second deposition taken just days before entry of Summary judgment, Comrie flatly admitted that Dr. Rodriguez's January 19, 1995 letter was a specific factor in the decision to fire him.

In view of the Supreme Court's recent pronouncement that circumstantial proof of intent warrants a mixed motives jury instruction in discrimination cases, the initial evidence which established Dr. Rodriguez's prima facie case should have sufficed to raise a jury question as to whether or not Defendant's claimed reasons for transferring and firing him were pretextual. *Desert Palace v. Costa*, 123 S. Ct. 2148, 156 L.Ed. 2d 84 (2003). The second deposition of Comrie, however added direct proof that the letter itself—the protected activity engaged in by Dr. Rodriguez—was definitely a cause of his firing. That alone would raise a jury question.

At the very least, Holy Cross Hospital's purported reasons for transferring Dr. Rodriguez just months after the letter and for firing him a few months later are susceptible to contrary interpretations. For example, Comrie admitted that Dr. Rodriguez regularly fulfilled all of his clinic and hospital duties, that Dr. Rodriguez maintained the appropriate standard of care for his patients and that *Dr. Rodriguez had not violated a single provision of his physician employment agreement.*

Defendant's low productivity excuse for transferring Dr. Rodriguez is suspect as well. Low productivity, due to patient attrition from the practice, was expected by Holy Cross Hospital when Dr. Rodriguez was hired to replace the well established Dr. Morales. Holy Cross administrators admitted that it takes a couple of years for a practice to rebound from the loss of a doctor with such longstanding relationships as Dr. Morales had with his patients. In any event, Defendant admitted that Dr. Rodriguez's productivity actually increased after the transfer and that, as a result, he actually began to surpass the incentive compensation (bonus) thresholds set forth in the employment agreement. Thus, while low productivity arguably may have justified transferring Dr. Rodriguez, it was not a credible reason for the subsequent termination of his employment. Accordingly, if Defendant's purported non-retaliatory reasons for the termination were merely pretextual that would leave retaliation as the Defendant's only motive.

In view of Defendant's burden to show no genuine issue of material fact, even giving credence to Defendant's alleged non-retaliatory reasons, there still remains a jury question as to whether Dr. Rodriguez's January 19, 1995 letter (the protected activity) was a significant part of Defendant's mixed motives. Nonetheless, assuming *arguendo* that the evidence of record prior to summary judgment was insufficient, Comrie's second deposition taken just before but filed immediately after summary judgment was entered, constituted crucial proof warranting reconsideration and relief from the order.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO.: 03-13551C

JOSEPH A. RODRIGUEZ, M.D.,
Plaintiff-Appellant - Cross-Appellee,

versus

HOLY CROSS HOSPITAL, INC. d/b/a HOLY CROSS MEDICAL GROUP, HOLY CROSS HOSPITAL,
Defendants-Appellees - Cross-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA
LOWER TRIBUNAL NO. 03-60070-CIV-GRAHAM

REPLY BRIEF AND ANSWER BRIEF OF
PLAINTIFF/APPELLANT - CROSS/APPELLEE,
JOSEPH A. RODRIGUEZ, M.D.

GARY E. SHERMAN of
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(a) Dr. Rodriguez was not afforded a full and fair opportunity to demonstrate Holy Cross' intent as Holy Cross failed to produce discovery and the district court incorrectly preempted the Magistrate from entering sanctions against Holy Cross for spoliation of evidence 3

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II. The District Court's denial of Dr. Rodriguez's Rule 60 Motion for Reconsideration was an abuse of discretion because Comrie's second deposition testimony constituted direct evidence that Dr. Rodriguez's January 19, 1995 letter was a factor in Holy Cross' decision to terminate employment 18

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ARGUMENT

I. The District Court erred by determining as a matter of law that Dr. Rodriguez failed to rebut the reasons claimed by Holy Cross for taking adverse employment action against him.

(a) Dr. Rodriguez was not afforded a full and fair opportunity to demonstrate Holy Cross' intent as Holy Cross failed to produce discovery and the district court incorrectly preempted the Magistrate from entering sanctions against Holy Cross for spoliation of evidence.

Holy Cross proffered "lack of productivity" as a non-retaliatory reason for terminating Dr. Rodriguez's employment contract. However, the lack of productivity claim was an unverified conclusion not supported by any objective evidence produced by Holy Cross in this case.

Dr. Rodriguez's First Request for Production of Documents sought the following documents on the productivity issue:

> *Request No. 9*: All billing records for the practices in which Joseph A. Rodriguez, M.D. was employed during the specific time of his employment.
>
> *Request No. 20*: All records including, but not limited to patient records, supporting determinations of incentive compensation owed to and paid to Plaintiff.

On February 3, 2003, the Magistrate Judge overruled Holy Cross' objections to those requests and ordered Holy Cross to respond to the discovery. *See* R-3-12. Holy Cross appealed. R-3-13. On March 3, 2003, the court denied Holy Cross' appeal and affirmed the Magistrate Judge's order. R-3-27. With the discovery still owed by Holy Cross and Dr. Rodriguez's response to the Holy Cross motion for summary judgment coming due, Dr. Rodriguez moved for continuance on

March 4, 2003 pending receipt of the documents requested. R-3-28. On March 6, 2003, the district court stated that "the outstanding discovery should have already been presented to [Dr. Rodriguez]" yet inexplicably denied the motion for continuance. R-3-30. See *International Shortstop Inc. v. Rally's, Inc.*, 938 F. 2d 1257 (5th Cir. 1991) ("where the party opposing the summary judgment informs the court that its diligent efforts to obtain evidence from the moving party have been unsuccessful, a continuance of a Motion for Summary Judgment for purposes of discovery should be granted almost as a matter of course"). See also Fed.R.Civ.P. 37 (b)(C) (authorizing a stay of proceedings until the order compelling discovery is obeyed).

It was not until after Holy Cross lost its appeal that it filed a revised affidavit of its expert witness William Malcolm which revealed that computer printouts relating to Dr. Rodriguez's productivity and superbills *that were in patients' files* pertaining to charges for treatment rendered by Dr. Rodriguez were *thrown away* and could not be produced. R-3-33 (Second affidavit of William Malcolm). Thus, the records reviewed by the expert engaged by Holy Cross in connection with its claim that Dr. Rodriguez's productivity was low were never produced. These records were material because they would either corroborate or disprove the "low productivity" excuse assigned by Holy Cross for transferring and firing Dr. Rodriguez and certainly would have been the subject of scrutiny and analysis by a qualified expert engaged by Dr. Rodriguez.

On March 10, 2003, Dr. Rodriguez filed a Motion for Sanctions against Holy Cross for Spoliation and Failure to Produce Evidence. R-3-34. Holy Cross responded with a Motion for Clarification and admitted to the court that there were, indeed, records *in its possession* for patients treated by Dr. Rodriguez that Holy Cross could not produce due to alleged "technological" problems. R-3-44-5. On March 13,

2003, just days before Dr. Rodriguez's response to Holy Cross' Motion for Summary Judgment was due, Holy Cross then served its Fourth Supplemental Response to Plaintiff's First Request to Produce formally stating that "[i]t has records for patients seen by Rodriguez *in its possession, custody and control* [but] Defendant is unable to locate certain of those records . . . ." R-4-81-7. Those missing records were never produced by Holy Cross and the Magistrate Judge was denied the chance to consider the spoliation issue and whether evidentiary or other sanctions were warranted as a result.

Holy Cross also asserts that its adverse employment actions taken against Dr. Rodriguez could not possibly be construed as retaliatory by claiming that the May 24, 1994 superbill referenced by Dr. Rodriguez in his January 19, 1995 letter was not submitted to Medicare and that Holy Cross was not involved in a generalized pattern of submitting improper payment requests to Medicare—a bald assertion given its failure to produce records which should have been readily available. *See* Holy Cross Answer Brief at 8 and 10.

Dr. Rodriguez propounded a request in his First Request for Production of Documents which sought documents relevant to that precise issue as well:

> *Request No. 8*: All superbills, invoices and/or other billings after the retirement of Dr. Morales which contain his signature whether by rubber stamp or otherwise.

Holy Cross objected. The Magistrate Judge overruled the objections and stated:

> Plaintiff requests documents that are either relevant to his claims or . . . Defendant's defense that it did not demote or discharge Plaintiff because he took actions in furtherance of a potential False Claims Act Complaint. . . .

After the Magistrate Judge's order overruling the objections, Holy Cross stated:

> . . . there are no superbills, billings or invoices containing Dr. Morales' rubber stamped signature. In addition, other than the superbill specifically referenced in Plaintiff's Second Amended Complaint, Defendant is not in possession of and *has no knowledge* of any other superbills, billings or invoices generated after Dr. Morales' retirement that contained an original or copy of Dr. Morales' signature. . . .

The response by Holy Cross was disingenuous at best because Krauss explained that she regularly used superbills with Dr. Morales' signature on them *after he retired* as the basis for submitting Holy Cross billings to Medicare.

> Q. Now, you mentioned that the Dr. Morales signature on this superbill is a preprinted signature?
> A. Exactly.
> Q. And this particular chart that we're looking at is dated May 24, 1999, correct?
> A. Yes.
>
> * * *
>
> Q. And you know that Dr. Morales was no longer practicing medicine on May 24, 1994, correct?
> A. Yes.
> Q. *Okay, were these forms being used routinely after he left the practice of medicine, the forms that had his signature on it*?
> A. *I used up everything that was left*.
> Q. And who would prepare the medicare filing?
> A. Me.
>
> * * *

See Krauss first depo at 100(23) - 102(7); 107(7-8). Although the forms used by Krauss were part of each patient's chart,

they were never produced to Dr. Rodriguez. *See* Krauss depo at p. 114(8) - 115(21).

The duty to preserve evidence can be created by contract, statute or litigation. *Silhan v. Allstate Ins. Co.*, 236 F. So. 1303, 1309 - 1312 (N.D. Fla. 2002); *Bondu v. Gurvich*, 473 So. 2d 1307, 1313 (Fla. 3rd Dist. Ct. App. 1984) and *Valcin v. Public Health Trust of Dade County*, 473 So. 2d 1297 (Fla. 3rd Dist. Ct. App. 1984) (statutory obligation to maintain medical records); *EEOC v. Jacksonville Shipyards*, 690 F. Supp. 995, 998 (M.D. Fla. 1988) (regulatory requirement to preserve evidence); *St. Mary's Hospital, Inc. v. Brinson*, 685 So. 2d 33 (Fla. 4th Dist. Ct. App. 1996) (duty to preserve evidence exists due to Defendant's knowledge of potential litigation); *Hogopian v. Publix Supermarkets, Inc.*, 788 So. 2d. 1088 (Fla. 4th Dist. Ct. App. 2001) (duty to preserve evidence exists because litigation was foreseeable).

The Physician Employment Agreement (section D, page 4) between Holy Cross and Dr. Rodriguez obligated Holy Cross to "maintain and preserve" Dr. Rodriguez's medical records.

> D. *Records*. Doctor will prepare such records, charts, reports and forms on the services provided as may reasonably be required by Hospital . . . *to be maintained and kept* at such place as is designated by Hospital . . . .

The Florida Administrative Code ("FAC") obligated Holy Cross to preserve those records. *See* F.A.C. Ch.64.B 8-10. 002(3) (written patient records must be maintained for "at least five years from the last patient contract"). Florida Statutes obligated Holy Cross to preserve those records. *See also* F.S. §§ 458, 331 (1)(m); 456.057(7) (a)(2), and 456.057(4).

Moreover, Holy Cross was required to preserve all records evidencing the use of the facsimile signature of Dr. Morales after he retired because litigation was foreseeable at least as early as January 19, 1995 when Dr. Rodriguez wrote his letter complaining of Krauss' billing practices. *Silhan v. Allstate*

Ins. Co.; 236 F. Supp. at 1311-12 (citing *Hogopian and St. Mary's Hospital*).

Holy Cross' failure to maintain and preserve records requested by Dr. Rodriguez prevented Dr. Rodriguez from procuring evidence on the productivity issue and impaired his ability to obtain documents showing Krauss' improper use of Dr. Morales' signature as a foundation for false billings to Medicare. It is simply unfair for Holy Cross to assert non retaliatory reasons to rebut Dr. Rodriguez's prima facie case without producing existing records which could demonstrate that those reasons were pretextual.

As stated, the court has the power to sanction a party for failing to comply with a court order compelling discovery. Fed. R. Civ. P. 37(b)(A-C). The court also has the power to issue sanctions when a party fails to produce records in its possession, custody or control or when a party destroys records relating to a potential civil action. *Id.* See also *EEOC v. Jacksonville Shipyards, Inc.*, 690 F. Supp. 995, 997-98 (M.D. Fla. 1981) (the court has the *inherent* power to issue appropriate sanctions.) *William T. Thompson v. General Nutrition Corp. Inc.*, 593 F. Supp. 1443, 1445 (D.C. Cal. 1984).

A. Yes, because he wrote them like (indicating) . . . .
Q. Right. Do you know for sure that that's not your check mark on the left side?
A. Yeah. I didn't do that.

See Krauss Depo at p. 114(8) - 115(21).

By Counsel for Holy Cross:

Q. During your—during the time you worked with Dr. Rodriguez, did he always check off those boxes on the superbill?
A. Dr. Rodriguez checked off the boxes on the form. Yes. How else would I know? There are all different kinds of—I'm talking again. There are all different

kinds of diagnoses. The doctor checks off what the diagnoses it is.

* * *

See Krauss depo at p. 126(12) - 127(9).

Q. So earlier the question was posed to you, is there any reason to disbelieve Dr. Rodriguez's testimony that he never filled out these boxes and you said—

A. He had to fill them out. I don't know if that is the answer you're looking for. But he had to fill them out.

* * *

See Krauss depo at p. 128(4-10).

Q. But in reality you didn't prepare all of the superbills because Dr. Morales—I'm sorry—Dr. Rodriguez made the Xs in those boxes?

Q. Is that true?

A. Dr. Rodriguez . . .—made the—made those marks on there.

See Krauss depo at 142(12-21).

Dr. Rodriguez unequivocally testified that he did *not* write those Xs or anything else on that superbill. R-4-82 (Affidavit of Joseph A. Rodriguez, M.D.). Obviously, Dr. Rodriguez and Krauss cannot both be telling the truth. Fortunately, a stray March 5, 1993 superbill found during discovery which evidently was not purged from one patient's chart shows that Dr. Rodriguez testified truthfully and that Krauss did not. Comparing that stray March 5, 1993 superbill with the May 24, 1994 "Jane Doe" superbill illustrates handwritten "Xs" on each that were obviously written by the same person. R-4-81; R-4-84. However, Dr. Rodriguez was not employed by Defendant on March 5, 1993 and Dr. Morales was not employed by Defendant on May 24, 1994. Only one person was employed at that medical practice on both dates—Ardelle

Krauss. It was Krauss who wrote those tell-tale "Xs" representing codes which formed the basis of Holy Cross billings to Medicare. Thus, it is reasonable to infer that she routinely did so on superbills with Dr. Morales' signature after he retired as reported by Dr. Rodriguez in his January 19, 1995 letter.

Holy Cross asserts that its Director of Physician Services, Barbara Zimmerman, investigated the complaints set forth in Dr. Rodriguez's January 19, 1995 letter and determined that Dr. Rodriguez's concerns were "illusory and ill-founded." *See* Holy Cross brief at 12-13. However, Krauss testified that no one ever inquired of her about Dr. Rodriguez's allegations. *See* R-30-40 (First deposition of Krauss at 68(22)—70(19):

> Q. Did anyone bring to your attention the fact that Dr. Rodriguez complained or had some concerns or disagreement with the preparation of the superbills by you?
> A. No.
> Q. Did you ever have any conversations with Dan Comrie about Dr. Rodriguez's concerns regarding your preparation of the superbills?
> A. No.
> Q. Okay. All right. Did you ever have any conversations with Dan Comrie or any other administrator or employee at Holy Cross regarding any of the paperwork that you prepared in connection with patients treated at the Dr. Rodriguez practice?
> A. No.

Moreover, Krauss testified that the first time she saw the January 19, 1995 letter was when counsel for Holy Cross provided it to her during this litigation sometime in or after 1999. *See* R-30-40 (first deposition of Krauss at 80(3)—82(22)):

Q. Okay. And other than receiving the letter at that time, you've never had any discussions with any body about the issues raised in this letter?

A. No.

Clearly, there are questions about the veracity of the claims by Holy Cross that Dr. Rodriguez's concerns were investigated and determined to be "illusory and ill—founded."

Holy Cross acknowledges that Dr. Rodriguez was entitled to an opportunity to prove his case through either direct evidence or, if necessary, through indirect evidence using the *McDonnell Douglas* burden shifting framework. *See* Holy Cross Answer Brief at 27. The district court determined that Dr. Rodriguez met his initial burden and established a prima facie case which entitled him to the presumption that Holy Cross unlawfully retaliated against him. See R-4-104-17, 18 (Court Order Granting Summary Judgment). Holy Cross then met its burden of production by proffering non retaliatory reasons for taking adverse action against Dr. Rodriguez. *Id.*

However, that is not the end of the inquiry. *McDonnell Douglas*, 411 U.S. 792, 93 S. Ct. at 1826-27 (1973). If a Defendant proffers reasons sufficient to rebut the presumption created by the prima facie case, that "frame[s] the factual issue with sufficient clarity so that the Plaintiff will have a full and fair opportunity to demonstrate pretext." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct., 1089, 1094-95 (1981). The plaintiff is allowed to show pretext through the previously produced evidence which established the prima facie case as well as through additional evidence that may raise a question of fact as to whether the employer's reasons are legitimate. *Chapman v. Al Transport*, 229 F.3d 1012, 1024 (11th Cir. 2000). Thus, the allocation of burdens and presumptions described in *McDonnell Douglas* "is intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." *Burdine*, 450 U.S. 248, 101 S. Ct. at 1094 n.8.

Instead of allowing Dr. Rodriguez to develop the evidence on the factual question of Holy Cross' intent, the district court denied his March 4, 2003 Motion for Continuance even in the face of Holy Cross' failure to produce existing documents. (R-3-30). *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5, 257, 106 S. Ct. 2505, 2511 n.5, 2514, 91 L. Ed. 202 (1986) (non-moving party is entitled to a full opportunity to perform necessary discovery to oppose a motion for summary judgment). Then, by granting summary judgment while the spoliation issue was still under review, the district court preempted the Magistrate Judge from issuing evidentiary or other sanctions bearing on the question of Holy Cross' intent notwithstanding Holy Cross' claimed inability to produce documents which it admitted were in its possession, custody and control.

Potential sanctions could have ranged from an adverse inference that the spoliated evidence would have been unfavorable to Holy Cross to an order that Dr. Rodriguez's allegations be admitted or even an order striking Holy Cross' pleadings depending upon the degree of intent and prejudice involved. *See* Fed.R.Civ.P. 37(b) which authorizes the court to issue sanctions in regard to a party's failure to obey an order compelling discovery, including:

> (a) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
>
> (b) An order refusing to allow the disobedient party to support or oppose designated claims or defenses or prohibiting that party from introducing designated matters in evidence;
>
> (c) An order striking out pleadings or parts thereof; or staying further proceedings until the order is

> obeyed, or . . . rendering a judgment by default against the disobedient party; . . . .

Bashir v. Amtrak, 119 F. 3d. 929, 931-32 (11th Cir. 1997); See also *Valcin v. Public Health Trust of Dade County*, 473 So. 2d 1297, 1305 (Fla 3rd Dist. Ct. App. 1984). ("It is an unassailable and eminently sensible principle of law that courts will intervene to prevent a party from benefitting from its own misconduct"). Consequently, the district court erroneously denied Dr. Rodriguez a full and fair opportunity to demonstrate that the purported non retaliatory reasons proffered by Holy Cross were actually an excuse for retaliatory action.

> (b) Holy Cross initiated the transfer of Dr. Rodriguez to the Pompano clinic and later fired Dr. Rodriguez when he would not quit.

Holy Cross states that Dr. Rodriguez initiated the transfer of his practice to the Pompano clinic. See Holy Cross brief at 15. However, Dr. Rodriguez, merely said

* * *

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO.: 03-13551-CC
CONSOLIDATED WITH
CASE NO.: 03-13851-CC

JOSEPH A. RODRIGUEZ, M.D.,
Plaintiff-Appellant-
Cross-Appellee,

versus

HOLY CROSS HOSPITAL, INC.,
d/b/a Holy Cross Medical Group,
CROSS MEDICAL GROUP, HOLY CROSS HOSPITAL,
Defendants-Appellees-
Cross-Appellants.

MOTION TO STRIKE PORTION OF REPLY BRIEF
OF APPELLANT, JOSEPH RODRIGUEZ

Pursuant to FRAP 27 and 28, Holy Cross Hospital, Inc., the Appellee/Cross Appellant ("Holy Cross") moves this Court for the entry of an order striking Argument I(a) from the Reply Brief of the Appellant, Joseph A. Rodriguez, M.D. ("Rodriguez") served on January 30, 2004, and as grounds therefore states:

A. PROCEDURAL HISTORY

1. This appeal arises out of an employment dispute between Rodriguez and his former employer, Holy Cross. Rodriguez' complaint alleged a federal claim for retaliation under 31 U.S.C. § 3730(h) of the False Claims Act.

2. On or about April 23, 2003, the United States District Court for the Southern District of Florida (the "District Court") granted Holy Cross' Motion for Summary Judgment. The District Court concluded that there was no causal connection by and between Rodriguez' alleged protected activity and the alleged adverse employment action. A copy of the District Court's Final Summary Judgment is attached hereto as Exhibit A.

3. On July 21, 2003, Rodriguez filed his Civil Appeal Statement. Rodriguez' Civil Appeal Statement identified his sole issue on appeal as:

> Whether or not Plaintiff raised a genuine issue of material fact on the issue of causal connection between Plaintiff's protected activity and the adverse employment action taken against him by Defendant.
>
> A copy of Rodriguez' Civil Appeal Statement is attached hereto as Exhibit B.

4. On or about November 15, 2003, Rodriguez filed his Initial Brief. Pursuant to 11th Cir. R. 28-1, Rodriguez was required in his brief to supply a Statement of the Issues. Consistent with his Civil Appeal Statement in his Statement of the Issues, Rodriguez identified only two issues on appeal, to wit:

> (a) Did the District Court err in granting summary judgment in favor of Holy Cross determining, as a matter of law, that Dr. Rodriguez failed to establish the causal link between his protected activity and adverse employment actions taken against him by Holy Cross; and
>
> (b) Did the District Court abuse its discretion when it denied Dr. Rodriguez' Motion for Relief from Summary Judgment by concluding that the testimony of Dan Comrie at his second deposition did not add anything

significant to the testimony he gave at his first deposition? A copy of Rodriguez' Statement of Issues filed as page 2 of his Initial Brief is attached hereto as Exhibit C.

5. Rodriguesz' Initial Brief only raised and argued the two issues identified in his Statement of the Issues.

6. On December 16, 2003, Holy Cross filed its Answer Brief and its Initial Cross Appeal Brief. Holy Cross' Answer Brief responded solely to the two appellate issues raised in Rodriguez' Initial Brief.

7. On January 30, 2004, Rodriguez filed his Reply Brief and Answer Brief to the Cross Appeal.

8. In Argument I(a) of Rodriguez' Reply Brief (pages 3-16), Rodriguez for the first time raised as an additional issue on appeal whether the District Court erred by failing to grant Rodriguez' March 4, 2003 motion for continuance of the summary judgment in order to allow Rodriguez the opportunity to pursue additional discovery which was the subject of a spoilation motion then under review (see page 15 of Reply Brief).

9. As the issue of the District Court's failure to grant a continuance under these circumstances was never raised either in the Civil Appeal Statement or in the Initial Brief, the issue was waived. Moreover, by improperly adding an additional appellate issue to his Reply Brief, Rodriguez has thereby denied Holy Cross due process as there is no procedural mechanism for Holy Cross to respond to this belated and meritless argument.

B. GROUNDS FOR RELIEF

10. The Rules of Appellate Procedure provide that the appellant is required to identify the issues on appeal both in its Civil Appeal Statement and to both identify and brief all appellate issues in the appellant's Initial Brief. FRAP 28.

11. The requirement that an appellant identify and brief all appellate issues in the Initial Brief does more than provide a framework for presenting legal arguments. The requirement additionally provides notice to the adverse party of the issues which must be addressed in the Answer Brief. Accordingly, an appellant's failure to brief all appellate issues in the Initial Brief is not merely technical, but substantive.

12. Rodriguez' attempt to insert an additional appellate issue in his Reply Brief denies Holy Cross the opportunity to respond to the newly raised argument and as such, denies Holy Cross due process. This Court should not permit Rodriguez' belated and improper attempt to create an additional appellate issue after Holy Cross has filed its Answer Brief. See, *Adams v. Hinchman*, 154 F. 3d 420 (D.C. Cir. 1998) (Holding "It is our practice not to consider any issue raised for the first time in a reply brief, a point at which the opposing side has no opportunity to respond"); Larouche and *Larouche Democratic Campaign '88 v. Federal Election Commission*, 28 F. 3d 137, 139-140 (D.C. Cir. 1994).

13. Moreover, Rodriguez' failure to raise and brief all appellate issues in his Initial Brief constituted a waiver of any issue not raised in the Initial Brief. *United States of America v. Garcia-Lopez*, 49 Fed. Appx. 737, 2002 U.S. App. Lexis 22610 (9th Cir. 2002) (citing *United States v. Alexander*, 287 F. 3d 811, 817 n. 2 (9th Cir. 2002).

C. RELIEF REQUESTED

14. Holy Cross requests that this court enter an order striking Argument I(a) from Rodriguez' Reply Brief found at pages 3 through 16.

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed Mar. 3, 2004]

03-13551-CC & 03-1385.-CC

JOSEPH A. RODRIGUEZ, M.D.,
Plaintiff-Appellant
Cross-Appellee,

versus

HOLY CROSS HOSPITAL, INC.,
d.b.a. Holy Cross Medical Group,
HOLY CROSS HOSPITAL,
Defendants-Appellees
Cross-Appellants.

On Appeal from the United States District Court
for the Southern District of Florida

ORDER:

Appellees-Cross-Appellants' motion to strike Appellant-Cross-Appellee's second brief is GRANTED IN PART, to the extent that the brief challenges the denial of Appellant's motion for continuance or relies upon inferences drawn from the non-production of certain evidence during discovery. Appellant is directed to file a corrected brief which omits such references within fourteen (14) days of the date of entry of this order.

/s/ [Illegible]
United States Court of Appeals

UNITED STATES COURT OF APPEALS
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Thomas K. Kahn
Clerk

In Replying Give Number
Of Case And Names of Parties

March 03, 2004

MEMORANDUM TO COUNSEL OR PARTIES

RE: 03-13551-CC Joseph A. Rodriguez, M.D. v. Holy Cross Hosp. DC DKT NO.: 03-60070 CV-DLG

The following action has been taken in the referenced case:

The enclosed order has been ENTERED.

THIS ORDER IS FOR CONSOLIDATED CASES 03-13551-CC & 03-13851-CC.

Sincerely,

THOMAS K. KAHN, Clerk
Reply To: Eleanor Dixon (404) 335-6172

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 99-7567-CIV-GRAHAM/GARBER

UNITED STATES OF AMERICA.,
ex rel. JOSEPH A. RODRIGUEZ, M.D.,
Plaintiffs,

v.

HOLY CROSS HOSPITAL, INC.,
a Florida corporation d/b/a
HOLY CROSS MEDICAL GROUP and HOLY CROSS HOSPITAL,
Defendants.

RELATOR'S FIRST REQUEST TO PRODUCE

Relator, JOSEPH A. RODRIGUEZ, M.D., in accordance with Rule 34 of the Federal Rules of Civil Procedure, request the Defendants to file a written response within thirty (30) days of this Request for Production and to produce and permit the Relator to inspect at the offices of Defendants' counsel the following documents:

DEFINITIONS AND INSTRUCTIONS

A. "You" or "your" as used herein means the Defendant, whether through any of its agents, officers, directors, employees or any other party.

B. "Person" means any natural person; private or public corporation, whether or not organized for profit; governmental entity; partnership; association; cooperative; sole proprietorship; or other legal entity. With respect to a business entity, the term "person" includes any natural person

acting formally or informally as an employee, officer, agent, attorney or representative of the business entity.

C. "Defendant" or "Defendants" as used herein means all Defendants, whether through any of its agents, officers, directors, employees or any other party.

D. The term "Documents" as used in this Request is defined as including, but not limited to, the original and any non-incidental copy (which is different from the original because of notations on such copy or otherwise) of all correspondence, telegrams, teletype messages, contracts (including drafts, proposals and any and all exhibits thereto), draft minutes and addenda, memoranda (including inner and intra office memoranda), memoranda for file, pencil jottings, diary entries, desk calendar entries, reported recollections and other written form of notation of events or intentions, transcripts and recordings of conversations and telephone calls, books, records, photographs, reports, tabulations, charts, books of account, ledgers, invoices, financial statements, purchase orders, receipts, cancelled checks and other documentary material not subject to attorney/client privilege, together with any documents thereto, or enclosures therewith. The term "Document" shall include data stored, maintained or organized electronically or magnetically through computer equipment, translated, if necessary, by you into comprehensible form.

E. This Request for Production calls for production of all responsive Documents in your possession, custody or control without regard to physical location of said Document.

F. All Documents shall be originals unless otherwise indicated. If your original is a photocopy or other copy, then the photocopy shall be produced as the original.

G. If you possess no Documents responsive to a paragraph in this Request, state this fact, specifying the paragraph concerned.

H. If you object in part to any Request for Production, produce the portion of the Documents requested to which you do not object, and state your objections to the remainder.

I. If you claim a privilege of any type with respect to any of the Documents, please identify the document by date, title and such other descriptive information as will clearly identify the Document. Further, the objection should state the legal basis of the privilege claimed and provide such supporting information as will establish the claimed privilege.

DOCUMENTS TO BE PRODUCED FOR INSPECTION

1. The entire personnel file of Joseph A. Rodriguez, M.D.
2. All correspondence between Joseph A. Rodriguez, M.D. and any hospital administrator for the Defendant.
3. All correspondence between Joseph A. Rodriguez, M.D. and any representative and/or agent of the Defendant (except for attorney client communications which should be identified on a privileged document log).
4. The entire personal file for Ardelle Krauss.
5. All correspondence between Ardell Krauss and any hospital administrator for Defendant that it any way mentions, refers to or relates to Joseph Rodriguez, M.D.
6. All correspondence between Ardelle Krauss or any representative and/or agent of the Defendant (except for attorney-client communications which should be identified in a privileged document log).
7. All documents provided to the United States of America in response to any subpoenas issued by the United States or any agencies of the United States.

8. All superbills, invoices, and/or other billings after the retirement of Dr. Morales which contain his signature whether by rubber stamp or otherwise.

9. All billing records for the practices in which Joseph A. Rodriguez, M.D. was employed during the specific time of his employment.

10. All cost reports submitted by Defendant to the government during the time Joseph A. Rodriguez, M.D. was employed by Defendant.

11. All records which support the incentive compensation paid to Dr. Rodriguez during - his employment with Defendant.

12. All records which support the incentive compensation paid to Jean Claude Bourque during his employment with Defendant while Joseph A. Rodriguez was employed at the same medical practice that Jean Claude Bourque was employed at.

13. Any and all audits performed regarding Joseph A. Rodriguez's incentive compensation entitlement and all supporting documentation and records considered in reaching the conclusions set forth in said audits.

14. All records reflecting patient complaints regarding the medical practice Joseph A. Rodriguez was transferred to after working in the Morales medical practice. These records should be produced for the following period:

    a. The time period during which Dr. Rodriguez was employed in that medical practice.

    b. The 2 years preceding the commencement of Dr. Rodriguez's employment in that medical practice.

15. All records reflecting Defendant's determination of Dr. Rodriguez's deferred compensation entitlements.

16. All correspondence between Defendant and the government in connection with the false claim allegations set forth in any of the court papers filed in this action.

17. Physician Employment Agreement and all other documentary evidence reflecting employment agreements, employment benefits and compensation arrangements between the parties.

18. All internal memoranda, minutes of meeting or documents maintained by Defendant regarding or mentioning Plaintiff including, but not limited to, all such material relating to termination of Plaintiffs employment and compensation owed and/or to be paid to Plaintiff at termination.

19. All financial records evidencing compensation owed to and paid to Plaintiff.

20. All records including, but not limited to patient records, supporting determinations of incentive compensation owed to and paid to Plaintiff.

21. All records evidencing patients treated by, examined by or seen by Dr. Rodriguez during his employment with Defendant.

22. All records evidencing patients treated by any doctor, examined by any doctor or seen by any doctor associated with Dr. Rodriguez at any medical practice during Dr. Rodriguez's tenure with Defendant.

APPENDIX G

Gary E. Sherman, PA
440 S. Andrews Avenue
Ft. Lauderdale, Florida 33301

Page: 1

JOSEPH A. RODRIGUEZ, M.D. 09/25/01
Weston Medical Suites CLIENT 1369M
1845 N. Corporate Lakes Boulevard
Weston FL 33326

ATTN: Dr. Joseph A. Rodriguez

CONSOLIDATED SUMMARY BILLING STATEMENT

Previous Balance	Fees	Expenses	Advances	Payments	Balance
1369-01 Rodriguez v. Holy Cross Hospital (Qui Tam)					
0.00	23,727.50	735.76	27.38	0.00	$24,490.64
0.00	23,727.50	735.76	27.38	0.00	$24,490.64

Statement payable upon receipt. Balances over 30 days past due will accrue interest at the rate of 12% annually. Please direct all billing inquiries to Donna. Please remit copy of consolidated summary statement with payment. Thank You.

Draft Statement Run Totals 09/25/01

Statements Printed:	1
Hours:	94.91
Fees:	23,727.50
Expenses:	735.76
Advances:	27.38

		HOURS
	appointment, settlement posture, upcoming vacation and previous discussion with Department of Justice attorney's damage analysis which client believes does not properly account for Dr. Morales' billings between January to March 1994.	0.40
08/17/01	GES Conference with Dr. Rodriguez re: settlement issues and Broad & Cassel conflict of interest issues.	2.00
	GES Conference with client at my office and telephone conference with me, client and Department of Justice counsel Tingle regarding government's proposed settlement of $25,000.00 and Dr. Rodriguez' agreement no to object to proposed settlement of False Claims Act settlement. Discussion of conflict of interest issue raised after conference call when client advised that Broad & Cassel represented him in a separate matter after we were informed by Department of Justice attorney Tingle that Broad & Cassel represents Holy Cross in defense of the Qui Tam action brought by client. Discussion of conflict of interest issue with Department of Justice attorney Tingle.	2.00

	GES Legal research and review of Rules of Professional Responsibility and relates to conflict of interest.	1.00
08/20/01	GES Review correspondence from client re: conflict of interest issue and bills from Broad and Cassel. Review Broad & Cassel's engagement letter to Dr. Rodriguez. Transmit by fax to attorney Michal Tingle.	0.60
08/21/01	GES Preparation of letter to client confirming discussion at August 17, 2001 meeting re: conflict of interest and detailing analysis of legal research, (Rule 4-1.7) re: conflict of interest and how application of Rule may lead Broad & Cassel to withdraw from further representation of client while continuing on behalf of Holy Cross.	1.50
08/24/01	GES Review Department of Justice letter to Ed Hopkins re: conflict of interest dated 8/22/01.	0.20
	GES Review letter from attorney Hopkins to Dr. Rodriguez withdrawing from further representation of him due to conflict of interest and explaining that matters are separate and due to seal conflict was unknowing.	0.30
	GES Review letter from client objecting to continued participation in Qui Tam by Broad & Cassel firm.	0.30

	GES Telephone conversation with client re: conflict of interest analysis and his acquiescence not to pursue disqualification of Broad & Cassel in court.	0.50
	GES Preparation of letter to client addressing conflict of interest issues and probability that Rules of Ethics permit Broad & Cassel to continue representing Holy Cross if it makes Dr. Rodriguez a former client by withdrawing from representation on that separate unrelated matter. Discussion of new September 8th deadline conveyed by Department of Justice and re: authorization by client of $25,000.00 false claims act settlement.	1.00
08/27/01	GES Preparation of letter transmitting Department of Justice letter by attorney Tingle to attorney Hopkins re: conflict of interest issue.	0.20
	GES Preparation of letter to attorney Tingle transmitting letter sent by attorney Hopkins to client and me.	0.20
	GES Review letter from client re: how to	

(2)

Supreme Court, U.S.
FILED
AUG 31 2005
OFFICE OF THE CLERK

No. 05-154

IN THE SUPREME COURT OF THE UNITED STATES

In re Joseph A. Rodriguez, M.D.
PETITIONER

ON PETITION FOR AN EXTRAORDINARY WRIT OF MANDAMUS TO REVERSE JUDGMENT TO

The United States Court of Appeals for the 11th Circuit

SUPPLEMENTAL BRIEF OF PETITIONER

Joseph A. Rodriguez, M.D.
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QUESTION(S) PRESENTED

1. Does this Court have jurisdiction to issue an extraordinary writ under Sup. Ct. R. 20 and 28 U.S.C. § 1651?

2. Did Petitioner err in presenting petition for extraordinary writ of mandamus in lieu of petition for certiorari before this Court?

3. Does this Court's ruling in Graham County Soil & Conservation District v. U.S. ex. rel. Wilson have retroactive applicability?

4. Would a supplemental spoliation of evidence tort, recognized by Florida courts, endowed with ample statute limitations, and arising from Respondent's mishandling of dispositive material evidence destined for this Federal trial, preserve the temporal validity of this lawsuit should the Court's answer to question 3 prove affirmative?

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

- THE HONORABLE DONALD L. GRAHAM, UNITED STATES DISTRICT JUDGE
- THE HONORABLE BARRY L. GARBER, UNITED STATES MAGISTRATE JUDGE
- JOSEPH A. RODRIGUEZ, M.D., PETITIONER
- HOLY CROSS HOSPITAL, INC. d/b/a HOLY CROSS MEDICAL GROUP AND HOLY CROSS HOSPITAL, RESPONDENT
- EDWIN KNEEDLER, DEPUTY SOLICITOR GENERAL FOR THE UNITED STATES
- CHARLIE CRIST, ATTORNEY GENERAL, STATE OF FLORIDA
- BROAD AND CASSEL—LAW FIRM FOR RESPONDENT
- LAW FIRM OF GARY E. SHERMAN, P.A.
- GARY E. SHERMAN, TRIAL COUNSEL FOR PETITIONER
- STEVEN ELLISON, COUNSEL OF RECORD
- STEVEN M. PARRISH, COUNSEL FOR RESPONDENT

- ANDREW RAFKIN, COUNSEL FOR RESPONDENT
- HOLY CROSS HEALTH MINISTRIES, INC.
- CATHOLIC HEALTH EAST

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JURISDICTIONAL STATEMENT

This Court has jurisdiction in this matter under Sup. Ct. R. 20 and 28 U.S.C. § 1651. An Extraordinary Writ of Mandamus will aid the Court in the exercise of its appellate and supervisory jurisdictions. Truly exceptional circumstances warrant the exercise of this Court's discretionary powers.

"Supreme Court Rule 20; Procedure on a Petition for an Extraordinary Writ; Requirements:

1. Writ will be in aid of the Court's appellate jurisdiction.
2. Exceptional circumstances warrant the exercise of the Court's discretionary powers.
3. Adequate relief cannot be obtained in any other form or from any other court."

Application of Rule 20:

1. Affirmative. Petitioner has raised significant appellate and supervisory jurisdiction questions:
   A) Should Florida Law's (Florida State Constitution, Article I, § 22 and Florida Supreme Court rulings) summary judgment standard clash markedly with the apparent Federal summary judgment standard practiced by the U.S. 11th Circuit Court of Appeals?
   B) Is flagrant, unremedied Conflict of Interest acceptable for attorneys practicing in the Federal courts?
2. This is detailed in the Petition.
3. But has Petitioner actually sought relief from any other court, in earnest? Furthermore, have any significant judicial events taken place since the Petition's initial filing date of March 14, 2005?

On May 13, 2005, one year following newspaper publication (Date of Discovery) of the Fraud/Suicide of Respondent's highly-trusted Director of Operations, Petitioner filed with the U.S. District Court for the Southern Region of Florida a Motion to Set Aside Summary Judgment, to Set New Trial and to Disqualify Respondent's Counsel with supporting Memorandum of Law.

In court documents, Petitioner and Respondent both acknowleged that, due to Mandate Doctrine, issues previously raised with U.S. District and 11th Circuit Courts could not be raised as valid bases for reversal of judgment and for the setting of New Trial at the District and Circuit court levels. The core bases of Petitioner's arguments had never been documented by U.S. District and Circuit courts and were derived directly from the text of this Petition for Extraordinary Writ of Mandamus and pertained to the Fraud/Suicide of Respondent's Director of Operations and to the Conflict of Interest of Respondent's Counsel.

Furthermore, as this matter was technically on "appeal" before the Supreme Court of the United States on the May 13 filing date, the U.S. District Court—Miami was effectively divested of jurisdiction to act in favor of any Motion presented to it should the District Court be so inclined. Nonetheless, it was acknowleged by Petitioner and Respondent in court documents that should the District Court opine favorably on a submitted Motion, even while divested of jurisdiction, said opinion could accompany a Motion for Leave to the Upper Court (presumably, the Supreme Court of the United States) seeking that the matter be remanded back to the District Court for trial. Mahone v. Walter S. Ray, 326 F. 3d 1176, 1180 (11th Cir. 2003); Harcon Barge Co. Inc., v. D & G Boat Rentals, Inc., 784 F.2d 665 (5th Cir. L986); Willie v. Continental Oil Co., 784 F.2d 706 (5th Cir.

1996); Venen v. Sweet, 758 F.2d. 117 (1985); g. Griggs v. Provident Consumer Discount Co., 459 U.S. 56 (1982).

Although divested of jurisdiction, the opinion of the U.S. District Court--Miami was succinct and provided no explanations. The text of said ruling follows:

"ORDER
THIS CAUSE came before the Court upon Plaintiff's Motion to Set Aside Summary Judgment, To Set New Trial, and to Disqualify Defense Counsel (D .E . 150) and Plaintiff's Prayer for Relief and Motion to Strike Defendant's Memorandum of Law in Opposition to Motion to Set Aside Summary Judgment, to Set New Trial and to Disqualify Defense Counsel (D .E . 156) .

THE COURT has considered the Motions, the pertinent portions of the record, and being otherwise advised in the premises, it is ORDERED AND ADJUDGED that the Motion to Set Aside Summary Judgment, to Set New Trial, and to Disqualify Defense Counsel (D .E . 150) is DENIED .

It is further ORDERED AND ADJUDGED that the Motion to Strike Defendant's Memorandum of Law in Opposition to Motion to Set Aside Summary Judgment, to Set New Trial and to Disqualify Defense Counsel (D .E . 156) is DENIED .

DONE AND ORDERED in Chambers at Miami, Florida ,
of June 10, 2005.
DONALD L . GRAHAM
UNITED STATES DISTRICT JUDGE
CC : Counsel of Record"

(Gary Sherman, Petitioner's Trial Counsel, had withdrawn as Petitioner's counsel--by mutual accord and by motion--

before the 11th Circuit Court of Appeals, immediately following the October 22, 2004 date of Appellate Court Affirmation and prior to the December 6, 2004 date of Mandate. This permitted Petitioner to file timely Motion to Reconsider Affirmation of Summary Judgment Based Upon Spoliation of Evidence as Pro Se litigant in accordance with 11th Circuit Court Rules. Gary Sherman's withdrawal as Counsel was reportedly not communicated to the U.S. District Court—Miami and the original ruling cited above was forwarded to Gary Sherman, directly, as if he were the current "Counsel of Record". Petitioner discovered this judicial/clerk error nearly one month after the fact when he called the U.S. District Courthouse to inquire about the "pending ruling".)

Evidently, the U.S. District Court—Miami is not inclined to grant Petitioner a court trial before a jury of peers as is his Right under the Florida Constitution, Basic Rights,Article I, § 22, Jury Trial and as required by prior Supreme Court Ruling, Reeves v. Sanderson Plumbing Products, Inc., 120 S. Ct. 2097, 530 US 133. Yet there can be no doubt that Petitioner has been diligent in complying with the third requirement of Sup. C. R. 20, i.e. to seek "adequate relief"..."from any other court".

Respondent, Opposition Brief, Footnote 5: "The order was not appealed". Scarce free time in the life of Petitioner (who is a full-time solo practicing family physician) has not allowed him to "appeal" the June 10, 2005 District Court ruling except before the Supreme Court of the United States by way of this Supplemental Brief.

Petitioner satisfies the three requirements under Sup. C. R. 20 and the appellate and supervisory jurisdictions of the

U.S. Supreme Court are invoked. A Petition for Extraordinary Writ of Mandamus would be the most appropriate form for the Petitioner to petition for redress under the extraordinary circumstances of this case. As a result, Petitioner's Petition was timely filed, and the Supreme Court of the United States has unhindered jurisdiction in addressing this matter under Sup. Ct. R. 20 and 28 U.S.C. § 1651.

STATUTE LIMITATIONS

This Court recently ruled in Graham County Soil & Conservation District v. U.S. ex. rel. Wilson, 125 S. Ct. 2444;162 L. Ed. 2d 390 (2005) that limitations period of 31 U.S.C. §3731(b)(1) does not govern §3730(h) retaliation actions. Instead, the most closely analogous state statute of limitations applies. Pp. 4—13. To determine the applicable statute of limitations for a cause of action created by federal statute, this Court asks first whether the statute expressly supplies a limitations period. If not, the most closely analogous state limitations period applies. Pp. 4—5.

On perusal of the decision, no retroactive applicability is suggested for cases currently in the courts, such as this one, which Respondent has acknowleged was timely filed within the conventional, Federal six year statute limit for civil actions.

Respondent has acknowleged the commission of spoliation of evidence in this matter. A Government Contractor in healthcare, Respondent had a contractual duty to retain billing records for Government auditing purposes and for Petitioner's use by Employment Agreement. Spoliation of Evidence is a tort recognized by Florida courts. The tort encompasses intentional spoliation, negligent spoliation as

well as spoliation by third-party perpetrators such as accountants, auditors, attorneys etc. Coleman v. Eddy Potash, Inc., 120 N.M. 645, 649 (1995); Continental Insurance Co. v. Herman, 576 So. 2d 313, 315 (Fla. Dist. Ct. App. 1990); Smith v. Atkinson, 771 So. 2d 429, 432 (Ala. 2000). To recover damages plaintiff need not prove the exact dollar amount of damages, it is sufficient to show that plaintiff was damaged with certainty. Miller v. Allstate Insurance Co. , 573 So. 2d 24 (Fla. Dist. Ct. App. 1990) relying on C. McCormick, Damages §31 at 101-102 (1935); W.W. Gay Mechanical Contractor, Inc. v. Wharfside II, Ltd., 545 So. 2d 1348 (Fla. 1989).

If intent or fraud can be shown, punitive damages may be awarded. In State Farm Mutual Automobile Ins. Co. v. Campbell, 123 S.Ct. 1513 (2003), this Court instructed courts below to weigh the presence of a number of factors in awarding punitive damage awards--some of which are relevant to this case:

1. The tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others. [The intolerable workplace to which Petitioner was subjected (well characterized by the sworn depositions of Susan Anastay, Dr. Jean-Claude Bourque, and the Petitioner) and which Respondent refused to reform, was dangerous to Petitioner in a professional licensure and medical liability sense but much more dangerous to the patients being treated there.]

2. The target of the conduct had financial vulnerability. [Not only did Respondent retaliate against Petitioner by firing him due to his Protected Activity, by wrongfully retaining his earned wages, and by invoking the Employment Agreement's restrictive clause—thus

exiling Petitioner from the very patient base he needed to ply his livelihood—the Respondent then proceeded to spoliate the evidence needed by Petitioner to recover his meritorious claims in a court of law.]

3. The conduct involved repeated actions. [Respondent's sworn affidavits and those of his accountant or auditor describe a series of evidence spoliation sprees—some attributed by Respondent to computer "glitches", others to administrative blundering—in which virtually all of Petitioner's vital dispositive evidence, otherwise destined for this lawsuit, was spoliated.]

4. The harm was the result of intentional malice, trickery, or deceit. [The constellation of irregularities in Respondent's failure to preserve evidence coupled with involvement by the late Linda Perkins—highly-trusted Director of Operations of Respondent--who was later found by police committing ongoing fraud at the Respondent's premises, weighs heavily in favor of malice, trickery, and deceit.]

Statistically, the two largest categories of cases in which federal appellate courts have upheld punitive damage awards for repehensible conduct have involved intentional discrimination or fraud. Bogle v. McClure, 332 F.3d 1347, 1360-61 (11th Cir. 2003); Zhang v. Amer. Gem Seafoods, Inc., 339 F.3d 1020, 1043-44 (9th Cir. 2003); Youren v. Tintic Sch. Dist., 343 F.3d 1296, 1308-09 (10th Cir. 2003); Asa-Brandt, Inc. v. ADM Investor Servs., Inc., 344 F.3d 738, 746-47 (8th Cir. 2003); Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp., 345 F.3d 1366, 1371 (Fed. Cir. 2003).

Date of Discovery for spoliation of evidence in this case was in March 2003. The statute limitations for the tort vary according to the basis of the spoliation...

FLORIDA STATUTE LIMITATIONS

95.11 Limitations other than for the recovery of real property.--Actions other than for recovery of real property shall be commenced as follows:

(2) WITHIN FIVE YEARS.--
(a) An action on a judgment or decree of any court, not of record, of this state or any court of the United States, any other state or territory in the United States, or a foreign country.
(b) A legal or equitable action on a contract, obligation, or liability founded on a written instrument.

(3) WITHIN FOUR YEARS.--
(a) An action founded on negligence.
(f) An action founded on a statutory liability.
(h)An action for taking, detaining, or injuring personal property.
(i) An action to recover specific personal property.
(j) A legal or equitable action founded on fraud.
(o)An action for...any other intentional tort, except as provided in subsections (4), (5), and (7).
(p) Any action not specifically provided for in these statutes.

The issue of spoliation arose from this Federal lawsuit. 28 U.S.C. § 1367, supplemental jurisdiction, applies. "[t]he federal claim must have substance sufficient to confer subject matter jurisdiction on the court. The state and federal claims must derive from a common nucleus of

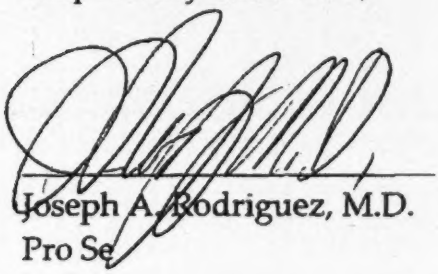
operative fact." United Mine workers v. Gibbs, 383 U.S. 715 (1966).

Given this to be the case and pursuant to Fed. R. Civ. P. Rule 15, Petitioner might then supplement the pleadings (with the gracious leave of the court) to include Spoliation of Evidence. With pleadings supplemented by a complaint or tort endowed with ample statute limitations, would this Federal lawsuit survive adverse retroactive interpretation of 31 U.S.C. 3730 (h) statute limits under Graham County Soil & Conservation District v. U.S. ex. rel. Wilson?

CONCLUSION

The petition for an Extraordinary Writ of Mandamus To Reverse Summary Judgment should be granted.

Respectfully submitted,



Joseph A. Rodriguez, M.D.
Pro Se

Date: August 30, 2005

No. 05-154

IN THE SUPREME COURT OF THE UNITED STATES

In re Joseph A. Rodriguez, M.D.
PETITIONER

ON PETITION FOR AN EXTRAORDINARY WRIT OF MANDAMUS TO REVERSE JUDGMENT TO

The United States Court of Appeals for the 11th Circuit

PETITION FOR REHEARING

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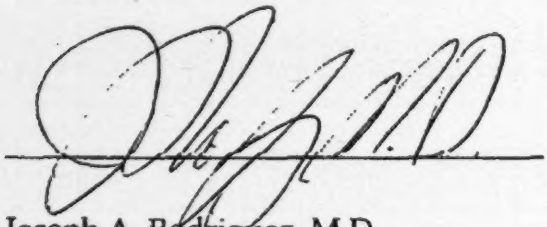
CERTIFICATE

Petitioner hereby certifies that this Petition for Rehearing shall be limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented. This Petition for Rehearing is presented in good faith and not for delay.

Respectfully submitted,



Joseph A. Rodriguez, M.D.

Pro Se

October 21, 2005

INTRODUCTION

Petitioner respectfully petitions for rehearing of a Court order denying his Petition for Extraordinary Writ of Mandamus to Reverse Summary Judgment. The request for rehearing is based upon Sup. Ct. Rule 44.2.

GROUNDS FOR REHEARING

John J. Roberts, Chief Justice of the Supreme Court of the United States, was confirmed by the U.S. Congress on Friday, September 30, 2005. Chief Justice Roberts began his duties at his new Federal post on Monday, October 3, 2005--the date on which the Court denied Petitioner's Petition for Extraordinary Writ of Mandamus to Reverse Summary Judgment. The actual Court Ruling states:

> "The petition for a writ of mandamus is denied. The Chief Justice took no part in the consideration or decision of this petition."

Petition, p. 2, ¶ 5:

> "The decision of the 11th Circuit to affirm summary judgment when there exist issues of material fact has so far departed from the accepted and usual course of judicial proceedings...as to call for an exercise of this Court's supervisory power."

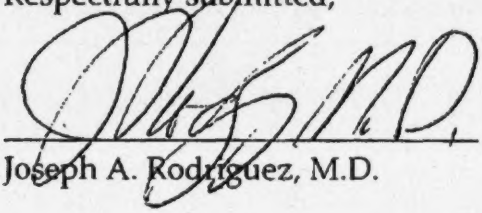
Because Petitioner had petitioned the Court under its discretionary appellate and supervisory jurisdictions, Petitioner was disappointed when he came to realize that denial of his Petition for Extraordinary Writ of Mandamus to Reverse Summary Judgment had taken place without the participation of the Supervisor of the Court, Chief

Justice John J. Roberts, in the "consideration" and "decision" processes concerning the Petition.

CONCLUSION

Petitioner prays that the Court grants him a rehearing of his meritorious Petition for Extraordinary Writ of Mandamus to Reverse Summary Judgment before a quorum of Justices and with the participation of Chief Justice John J. Roberts in the "consideration" and "decision" of the matter.

Respectfully submitted,



Joseph A. Rodriguez, M.D.

Pro Se

Date: October 21, 2005